Nos. 273 and 324

In the Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL-CIO

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court below (R. 195–204) is reported at 247 F. 2d 71. The findings of fact, conclusions of law, and order of the Board (R. 63–67, 26–61) are reported at 115 NLRB 800.

JURISDICTION

The judgment of the court below (R. 205-206) was entered on May 9, 1957, and its decree (R. 206–208) issued on June 7, 1957. The writs of certiorari were granted on October 14, 1957 (R. 209). The jurisdiction of this Court rests upon 28 U. S. C. 1254 and Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U. S. C. 160 (e).

STATUTE INVOLVED

The principal provision involved is Section 8 (b) (4) (A) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), which reads as follows:[1]

> SEC. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *

[1] Other relevant provisions of the Act are set forth in Appendix A, pp. 64–69, *infra*.

QUESTIONS PRESENTED

The question presented in No. 273 is whether union inducement of employees not to handle or work on goods, which would otherwise be proscribed as a secondary boycott by Section 8 (b) (4) (A) of the National Labor Relations Act, as amended, is lawful because the employer and the union have agreed by contract that the employees shall not be required to handle "unfair goods."

The questions presented in No. 324 are:

1. Whether, if the question in No. 273 is answered in the affirmative, the agreement therein described would also legalize inducement of the employees by another union, which is not a party to the contract;

2. Whether substantial evidence supports the Board's conclusion that this union's action was not primary activity outside the purview of Section 8 (b) (4) (A);

3. Whether the Board proceeding was rendered moot by settlement of the underlying dispute.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On September 15, 1954, Local 850 of the International Association of Machinists (hereafter called the Machinists), the bargaining representative of the production and maintenance employees of the American Iron and Machine Works, called a strike in support of its contract demands at the Company's three plants in Oklahoma City, Oklahoma.[2] The Ma-

[2] American Iron and Machine Works is engaged in the manufacture and sale of oil field equipment (R. 29).

chinists set up picket lines at each of the plants, and continued to picket there throughout the strike (R. 31; 128–130). The picketing deterred the five motor carriers normally servicing American Iron[3] from making pick-ups and deliveries at its premises, whereupon the Company hauled its freight in its own trucks to the Oklahoma City loading platforms of the carriers for shipment (R. 32; 118).

The Machinists followed the American Iron trucks to the premises of the carriers and picketed them while they remained there (R. 32; 124–125). The signs worn by the pickets did not name American Iron, stating simply that the Machinists were on strike (R. 32; 113). The Machinists admittedly intended that this picketing would induce the carriers' employees not to "get on the American Iron equipment and handle the freight" (R. 124–125, 119).

In addition to engaging in such picketing at the carriers' docks, the Machinists expressly requested employees of the motor carriers not to handle American Iron freight. Thus, at the dock of carrier Time, Machinists' Business Representative Foster, in the hope that Time employees "wouldn't get in the truck and be handling the stuff," informed a Time steward that Machinists had "a picket on a hot load of material out here" (R. 39; 123–124). Robert Pickett, a Machinists picket captain, stated to Troxel, a dock

[3] Santa Fe Trail Transportation Co.; Gillette Motor Transport; Time, Inc.; D. C. Hall Transportation Co.; and Lee Way Motor Freight Lines. These are common carriers for hire engaged in the interstate business of hauling freight by motor vehicle, under certificates from the Interstate Commerce Commission (R. 3, 9).

steward for carrier Santa Fe, "Well, I hope you boys observe our picket and help us out" (R. 37; 159-160). When an American Iron truck arrived at the dock of carrier Hall, Business Representative Foster told a Hall employee, who was prepared to assist in unloading freight on the truck, that "he couldn't help," and the employee immediately stopped (R. 39–40; 161). Similarly, on the arrival of such a truck at the Lee Way dock, Machinists' agent Pickett told William Hall, a Lee Way dock steward, that he "shouldn't" handle the freight on the truck (R. 40; 137).

General Drivers, Local No. 886 (hereafter called the Teamsters), was the collective bargaining representative of the employees of the motor carriers. Its contract with each of the carriers contained the following "hot cargo" clause (R. 41–42; 140, 187):

> ARTICLE 4
>
> * * * * *
>
> "(b) Members of the Union shall not be allowed to handle or haul freight to or from an unfair company, provided this is not a violation of the Labor Management Relations Act of 1947.

Invoking this clause, agents of the Teamsters directed the carrier employees to cease handling American Iron freight. In each instance, except that involving the Lee-Way Motor Freight Lines, the carrier, notwithstanding the hot cargo clause, ordered its employees to handle the freight. In every case, the carrier employees complied with the Teamsters' instructions (R. 49–57).

Thus, on September 16, 17 and 26, 1954, Teamsters stewards employed by carrier Santa Fe, predicating their action on the "hot cargo" clause in the Teamsters' contract with Santa Fe, ordered Santa Fe dock employees to refuse to handle American Iron freight (R. 49–50; 5–6, 9, 151). Santa Fe, entertaining doubts that the clause covered the American Iron situation, and hearing that the other carriers were handling American Iron freight, had previously instructed its employees to handle such freight (R. 50–51; 171). After the union's orders issued, Santa Fe's employees ceased to perform this work (R. 49–50; 5, 9, 169–170).

Similarly, carrier Gillette, believing that the handling of American Iron freight after it had been placed on the loading platform was not prohibited by the contract and that "according to the Interstate Commerce Commission we had to handle the freight" (R. 145), had directed its employees to handle such freight (R. 51; 144). About October 6, 1954, Teamsters agent Mitchell appeared on the Gillette dock and Gillette freight agent Berrong, in the presence of steward Hawkins, asked whether Mitchell considered the American Iron freight unfair once it was placed on the Gillette loading dock. Mitchell refused to make a definite statement but referred Berrong and Hawkins to Article 4 of the contract. Thereafter, all of Gillette's dock employees refused to handle American Iron freight (R. 51–52; 6, 9, 141–145).

Carrier Time first attempted to adjust to the American Iron labor dispute by handling American Iron shipments through dock foreman Armstrong and an

assistant foreman. However, believing that this might violate the provisions of the union contract prohibiting the performance of manual labor by supervisors, Time officials then assigned a dock employee, Brown, to this work. Brown refused, stating that Teamsters steward McGilliard had told him he would be fined $65 if he handled the "unfair" freight. The next day, foreman Armstrong spoke with McGilliard about the matter, and the latter replied that Teamsters agent Mitchell had ordered the employees not to handle American Iron freight. Thereupon, Armstrong and his assistant resumed handling such freight themselves, without the help of the rank-and-file employees (R. 53–54; 6, 9, 138–139).

At carrier Hall, terminal manager Lowe, about September 16, 1954, instructed an employee to handle some American Iron freight because "that's what we are in business for" and because other carriers were handling that freight (R. 55, 154, 156–158). When Teamsters steward Wilkerson learned of this, he contacted Teamsters agent Mitchell, who stated that such handling violated Article 4 (b) of the contract and that any union member doing so might lose his union book and thus be subject to discharge. Wilkerson relayed this information to the dock employees, and then advised Lowe that the men could not handle American Iron shipments. Lowe, in turn, advised American Iron representatives that Hall could not forward its freight, although it desired to do so (R. 55–56; 6, 7, 9, 151–158).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board, with two members dissenting, concluded that the Teamsters' appeals to the carriers' employees not to handle American Iron freight were violative of Section 8 (b) (4) (A) of the Act, notwithstanding the "hot cargo" clause in the Teamsters' contracts with the carriers. Two members of the Board majority (Chairman Leedom and Member Bean), adopting the view expressed in the earlier *Sand Door* case, 113 NLRB 1210,[4] held that, irrespective of the validity of the "hot cargo" clause itself, the Act precluded enforcement of the clause by union appeals to employees. They stated (R. 64):

> * * * any direct appeal by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present. Thus, while Section 8 (b) (4) (A) does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the employer to honor his contract, the Act does, in our opinion, preclude enforcement of such clause by appeals to employees, and this is so whether or not the employer acquiesces in the union's demand that the employees refuse to handle "hot" goods * * *

The third member of the Board majority (Member Rodgers) held that the "hot cargo" clause could not

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[4] Enforced, *sub nom. National Labor Relations Board* v. *Local 1976, United Brotherhood of Carpenters*, 241 F. 2d 147 (C. A. 9), and now before this Court in No. 127, certiorari granted, October 14, 1957.

serve as a defense to conduct within the purview of Section 8 (b) (4) (A) because the clause itself was contrary to the policy of the Act (R. 67).[5]

The Board, again with two members dissenting, further concluded that the Machinists' picketing and allied activities at the carriers' docks were likewise violative of Section 8 (b) (4) (A). The Board rejected the Machinists' contentions that their activity at the docks was merely an incident of legitimate

[5] Subsequent to its decision herein, the Board members have further explicated their reasons for holding that a "hot cargo" clause does not privilege union inducement of employees otherwise within the terms of Section 8 (b) (4) (A). *Truck Drivers Local Union No. 728 (Genuine Parts Company)*, 119 NLRB No. 53, reprinted in Appendix B, pp. 70–135, *infra*. In that case, four members of the Board (the three who comprised the majority here and Member Jenkins, who replaced one of the dissenters) subscribed to the ultimate conclusion in the instant case, *viz.*, that Section 8 (b) (4) (A) bars such inducement irrespective of the existence of a "hot cargo" clause (see also n. 25, p. 32, *infra*). In so doing, two members relied on the same reasons which they advanced here—*i. e.*, Member Bean was of the view that, although Section 8 (b) (4) (A) did not necessarily invalidate the "hot cargo" clause itself, the union's attempt to enforce the clause through employees came within the statutory prohibitions; and Member Rodgers adhered to the view that the "hot cargo" clause itself was invalid because contrary to the policy of the Act. However, Chairman Leedom, whose position in the instant case was the same as that of Member Bean, decided that, in a situation where the employer-party to a "hot cargo" clause was a common carrier subject to the Interstate Commerce Act (such as in *Genuine Parts* and this case), there was an additional reason why the clause could not be regarded as privileging Section 8 (b) (4) (A) conduct—*i. e.*, the clause was contrary to the obligations imposed on carriers by the Interstate Commerce Act, and hence invalid for this reason. Member Jenkins joined with Chairman Leedom in this view.

primary activity directed against American Iron, and that the activity was, in any event, lawful by virtue of the "hot cargo" clause in the Teamsters' contracts with the carriers (R. 65).

The Board entered an order requiring the Teamsters and the Machinists to cease and desist from the unfair labor practices found, and to post appropriate notices (R. 65–67).

C. THE DECISION OF THE COURT BELOW

The court below (with one judge dissenting on each part of the case) set aside the Board order against the Teamsters and enforced the Board order against the Machinists (R. 195–204). The court held that Section 8 (b) (4) (A) does not affect the validity of "hot cargo" agreements as such. From this, it reasoned that "it is hard to see how it can be said that, simply because the employees do what they have the right to do, there was a strike or refusal to work" (R. 198–199). Accordingly, the court concluded that the Teamsters' enforcement of their "hot cargo" agreements with the carriers by appeals to the carriers' employees was not in violation of Section 8 (b) (4) (A). However, the court concluded that the Machinists', picketing and related activity at the carriers' docks were violative of Section 8 (b) (4) (A). It ruled that, since the Machinists union was neither a party to, nor a third party beneficiary of, the Teamsters' contracts, these contracts could not make lawful the Machinists' secondary activities (R. 200).

SUMMARY OF ARGUMENT

I

Section 8 (b) (4) of the Act makes it an unfair labor practice for a labor organization or its agents to induce or encourage employees to engage in "a strike or a concerted refusal in the course of their employment" to work on any goods for an object (A) of "forcing or requiring * * * any employer or other person" to cease handling the products of, or to cease doing business with, any other person, or (B) of "forcing or requiring any other employer" to recognize a labor organization not certified by the Board as the representative of its employees. The basic question is whether union inducement of employees not to handle disfavored goods is exempt from the proscription of this section where the employer, by a "hot cargo" clause in his contract with the union, has, in effect, consented in advance to the employees' refusal. Interpreting the language of Section 8 (b) (4) (A) and (B) in the light of the purposes sought to be attained by Congress, the Board reasonably concluded that the section bans union inducement of employee refusals to work on disfavored goods irrespective of employer acquiescence.

A. As this Court recognized in *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U. S. 675, 686, Section 8 (b) (4) (A) and (B) was aimed at "secondary boycotts," and makes no distinction between "good secondary boycotts and bad secondary boycotts." The refusal of employees to handle the goods of another employer, merely because they were produced under conditions

disfavored by the union, was a practice which witnesses before the Senate Labor Committee repeatedly urged should be outlawed as a secondary boycott. Moreover, the legislative history shows that Congress specifically intended that Section 8 (b) (4) (A) and (B) would cover and prohibit such product boycotts when effected through work stoppages of employees. See 93 Cong. Rec. 4198–4199, 2 Leg. Hist. of the Labor Management Relations Act, 1947 (G. P. O., 1948), 1107–1108 (Senator Taft).

B. At the time of the enactment of Section 8 (b) (4) (A) and (B), the practice of securing in advance employer consent to the employees' refusal to handle disfavored goods, by means of a "hot cargo" clause in the collective bargaining contract, was a well known method of effecting these boycotts. Furthermore, the factor of employer acquiescence had been particularly common in the programs of the United Brotherhood of Carpenters and the International Brotherhood of Teamsters, the parent bodies of the unions involved in this case and the companion cases, Nos. 127 and 412. And Congress was aware of how these unions operated long before the passage of the Taft-Hartley amendments in 1947.

C. In view of Congress' desire and purpose to proscribe secondary boycotts effected by work stoppages of employees, without distinguishing between "good secondary boycotts and bad secondary boycotts," and its awareness that such boycotts were frequently carried out with the acquiescence of the employer, it seems unlikely that Congress would have intended to make an exception for the latter situation. An ex-

ception for employee work stoppages acquiesced in by the employer would be incompatible with the broad protection which Section 8 (b) (4) (A) and (B) was intended to provide.

In banning secondary boycotts, Congress desired to protect not only the particular secondary employer whose employees would be the immediate target of the union's inducement, but also the other employers and persons, including members of the general public, who would be affected by the boycott. This is demonstrated not only by the legislative history; it also finds expression in the statutory provisions. Thus, the fact that Section 8 (b) (4) (A) and (B) was enacted for the protection of the public is shown, *inter alia,* by Section 10 (l), which empowers and directs the Board, "acting in the public interest and not in vindication of purely private rights" (S. Rep. No. 105, 80th Cong., 1st Sess., p. 8, 1 Leg. Hist. 414), to apply for immediate injunctive relief against conduct which appears to be violative of the Section 8 (b) (4). Further, the illegal object specified in subsection (A) of Section 8 (b) (4) is "forcing or requiring * * * *any employer or other person*" to cease doing business with another. This language comprehends not only the employer whose employees may be induced by the union, but also other employers and persons who use, sell, transport, or handle the boycotted goods. And subsection (B) defines the illegal object as "forcing or requiring *any other* employer to recognize or bargain with a labor organization" unless such organization has been certified by the Board. The phrase "any other employer" obviously refers to the employer

with whom the union has its primary dispute, the purpose of the subsection being to preclude secondary pressure on him to grant recognition.

The purpose of Section 8 (b) (4) (A) and (B) thus being broader than merely to protect the secondary employer whose employees have been induced by the union, "obviously contractual waiver by [that] party * * * could be of no moment." *Alpert* v. *United Brotherhood of Carpenters,* 143 F. Supp. 371, 374–375 (D. Mass.). Otherwise, the public and the other employers and persons injured by the boycott would lose their statutory protection without their consent.

D. The language of Section 8 (b) (4) (A) and (B) permits a construction entirely consistent with the statute's history and purpose. The section proscribes a union from inducing or encouraging employees to engage in "a strike or a concerted refusal in the course of their employment" to handle products. While the terms "strike" and "concerted refusal" usually presuppose action which is contrary to the employer's will, this is not invariably so, at least in the case of "concerted refusal." Literally, the union induces a "concerted refusal" by employees to perform work whenever it requests them, while on the job, not to perform a task. Giving the term "concerted refusal" this interpretation is justified because it avoids the deleterious consequences of reading the term as comprehending only those refusals which are opposed by the employer, *i. e.,* foreclosing the other interests sought to be protected by Section 8 (b) (4) (A) and (B) without the consent of those affected.

In addition, there is persuasive evidence that Congress viewed the term "concerted refusal" as covering employee refusals acquiesced in by the employer, adding the term "strikes" to insure that the ban on secondary boycotts would also cover employee refusals which the employer opposed (92 Cong. Rec. 5724).

To interpret "concerted refusal" as covering all union-induced employee refusals, whether or not the employer has consented thereto, does not clash with the requirement of Section 8 (b) (4) that the employees' concerted refusal be "in the course of their employment." The phrase "course of their employment" as here used, serves to distinguish between employee refusals to handle products *qua* employees and their refusals to patronize disfavored employers or products in other capacities, *e. g.*, as consumers.

The court below reasoned that, if the Act does not prohibit an employer and a union from agreeing to a "hot cargo" clause, it would be anomalous if the union were unable to enforce the "hot cargo" clause through appeals to employees. However, this overlooks the fact that the secondary boycott provisions of the Act were not enacted solely for the benefit of the secondary employer who has contracted with the union. If, as we believe to be the case, Congress intended to protect other interests as well, the private contractual arrangement of the union and one of the persons affected cannot be decisive; it must give way to the extent necessary to permit the purposes of the section to be fully effectuated.

Nor is it relevant that Section 8 (b) (4) (A) and (B), although barring the union from appealing to

employees, might nevertheless permit enforcement of a "hot goods" clause through appeals or threats addressed solely to the *employer*. "An employer may well remain free to decide, as a matter of business policy, whether he will accede to a union's boycott demands, or if he has already agreed to do so, whether he will fulfill his agreement. An entirely different situation, however, is presented * * * when it is sought to influence the employer's decision by a work stoppage of his employees." *National Labor Relations Board* v. *Local 1976, United Brotherhood of Carpenters*, 241 F. 2d 147, 153 (C. A. 9), now before this Court in No. 127.

E. In any event, the consent manifested in the "hot cargo" agreement involved in this case is not entitled to legal recognition. It is the present view of a majority of the Board that a "hot cargo" clause is invalid, at least where, as here, the employer-party thereto is a common carrier subject to the Interstate Commerce Act. *Genuine Parts Company*, Appendix B, *infra*, pp. 70–135. If a common carrier cannot, consistently with the obligations of federal law, give or refuse service to customers on the basis of union preferences, an agreement to honor those preferences is vitiated.

II

A. Even if, contrary to our argument in Point I, the "hot cargo" agreement were deemed to privilege inducement of employees by the union which is a party to the contract, it does not follow that inducement of such employees by another union would also be exempt from Section 8 (b) (4) (A). Although

the employer may have consented to let the bargaining representative of his employees interrupt their handling of certain goods, there is no reason for assuming that the consent manifested in the "hot cargo" clause goes so far as to authorize such action on the part of a stranger union. Accordingly, inducement of employees by such a union can find no justification in consensual arrangement and it is plainly within the ban of Section 8 (b) (4) (A).

B. Substantial evidence supports the Board's conclusion that the Machinists' picketing and allied activity at the docks of the motor carriers were directed at the carriers and their employees, and were not merely an incident of legitimate primary picketing directed against American Iron.

C. The settlement of the underlying dispute did not render the Board proceeding moot. Discontinuance of an unfair labor practice does not preclude the Board from barring its resumption in the future.

ARGUMENT

INTRODUCTION

Section 8 (b) (4) of the Act makes it an unfair labor practice for a labor organization or its agents—

> to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to * * * transport, or otherwise handle * * * any goods * * *,

where an object thereof is:

> (A) forcing or requiring * * * any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the prod-

> ucts of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *.

In the instant case, it is clear that both the Teamsters and the Machinists induced or encouraged the employees of the motor carriers not to handle the freight of American Iron, which was engaged in a labor dispute with the Machinists, and that an object of this action was to stop the flow of products to and from American Iron. The principal question presented is whether the Teamsters' inducement nevertheless was exempt from the proscription of Section 8 (b) (4) (A) because the motor carriers had, by the "hot cargo" clause in their contracts with the Teamsters, in effect consented in advance to their employees not handling disfavored goods, such as the American Iron freight. Stated in statutory terms, the question is, first, whether employees may be induced to "strike" or concertedly to refuse to perform work "in the course of their employment" within the meaning of the first part of Section 8 (b) (4) (A), where their employer has previously consented to the action sought to be attained by the union, and, second, whether, in view of such acquiescence, there is a "forcing or requiring" of any employer to cease doing business with any other person, as proscribed in the "object" part of the section.

The court below concluded that there is no violation of Section 8 (b) (4) (A) where a union, which is a party to a "hot cargo" agreement with the employer, merely induces employees to abide by that agreement. This is also the view of the Second Cir-

cuit in *Milk Drivers and Dairy Employees Local Union No. 338* v. *National Labor Relations Board*, 245 F. 2d 817, which is now pending before the Court on petition for writ of certiorari in No. 412.[6] And the Board itself originally adopted this position.[7] However, after further study and consideration, the Board has concluded that the contrary view—*i. e.*, that a "hot cargo" clause does not remove union inducement of employee refusals to handle disfavored goods from the reach of Section 8 (b) (4) (A), or the companion Section 8 (b) (4) (B)[8]—is consistent with the language of these provisions and more fully effectuates their purposes. The Board's current view has been accepted by the Ninth Circuit in *National Labor Relations Board* v. *Local 1976, United Brotherhood of Carpenters*, 241 F. 2d 147, which is before this

[6] At least one judge on another panel of the Second Circuit has subsequently indicated his disagreement with the holding in that case; the other two judges reserved decision on the matter; *Douds* v. *Milk Drivers and Dairy Employees Union Local 584*, No. 24762, decided October 2, 1957, 40 LRRM 2669, 2672.

[7] *International Brotherhood of Teamsters, Local 294 (Raboin d/b a Conway's Express)*, 87 NLRB 972, 981-983, affirmed, *sub nom. Raboin d/b a Conway's Express* v. *National Labor Relations Board*, 195 F. 2d 906, 912 (C. A. 2); *Chauffeurs, Local Union No. 135 (Pittsburgh Plate Glass Co.)*, 105 NLRB 740.

[8] No. 412 involves Section 8 (b) (4) (B) as well as Section 8 (b) (4) (A). The only difference between the two provisions is in the object proscribed. Section 8 (b) (4) (B) defines the illegal object as "forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9."

Court in No. 127, certiorari granted, October 14, 1957.[9]

In Point I below, we urge that, interpreting the language of Section 8 (b) (4) in the light of the purposes sought to be attained by Congress, the Board reasonably concluded that it bans union inducement of employee refusals to work on disfavored goods, irrespective of whether the employer has acquiesced in the refusal. If this be so, the "hot cargo" clause in the Teamsters' contracts with the motor carriers could not authorize either that union or the Machinists to induce the carriers' employees not to handle American Iron freight.

The subsidiary questions presented by No. 324 are treated in Point II. There we argue: (1) that even if, contrary to Point I, the "hot cargo" clause afforded protection to the Teamsters, it did not sanction the Machinists' inducement of the carrier employees; (2) that the Machinists' inducement of such employees was not primary activity outside the purview of Section 8 (b) (4) (A); and (3) that the Board proceeding

[9] In addition to the decision in the instant case (115 NLRB 800, R. 63–72), see *International Brotherhood of Teamsters, Local No. 554 (McAllister Transfer, Inc.)*, 110 NLRB 1769; *Local 1976, United Brotherhood of Carpenters (Sand Door and Plywood Co.)*, 113 NLRB 1210; *Truck Drivers Local Union No. 728 (Genuine Parts Company)*, Appendix B, *infra*. See also, *National Labor Relations Board v. Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932 (C. A. 6); *Douds v. Milk Drivers and Dairy Employees Union Local 584* (C. A. 2), cited n. 6, *supra*; *Alpert v. United Brotherhood of Carpenters*, 143 F. Supp. 371 (D. Mass.); *Douds v. Milk Drivers and Dairy Employees Local No. 680*, 133 F. Supp. 336 (D. N. J.).

was not rendered moot by a settlement of the underlying dispute.

I

THE BOARD REASONABLY CONCLUDED THAT SECTION 8 (b) (4) (A) AND (B) OF THE ACT REACHES UNION-INDUCED EMPLOYEE REFUSALS TO WORK ON DISFAVORED GOODS IRRESPECTIVE OF WHETHER THE EMPLOYER HAS AGREED BY CONTRACT THAT THE EMPLOYEES NEED NOT WORK ON "HOT GOODS"

In construing Section 8 (b) (4) (A) and (B) of the Act, as the earlier cases before this Court involving that section illustrate,[10] one must "interpret its word in the light of its legislative history and of the particular evils at which the legislation was aimed." *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 489. Thus, read without reference to purpose, the words of this section would reach even strikes and picketing directed solely at the employer with whom the union has its primary dispute. *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665; *DiGiorgio Fruit Corp.* v. *National Labor Relations Board*, 191 F. 2d 642, 648-649 (C. A. D. C.), certiorari denied, 342 U. S. 869. Accordingly, before attempting to give content to the terms "strike" and "concerted refusal in the course of their employment," or the other terms used in Section 8

[10] *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665; *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U. S. 675; *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694; *Local 74, United Brotherhood of Carpenters and Joiners of America*, 341 U. S. 707.

(b) (4) (A) and (B), we turn to the legislative history to ascertain the "mischief to be corrected and the end to be attained." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 124. We shall urge: (1) that Congress intended to proscribe product boycotts of the type involved here, effected by work stoppages of employees; (2) that it was aware that employee refusals to handle disfavored products were often acquiesced in by the employer, either through "hot cargo" agreements or other arrangements with a union; and (3) that there is every reason to conclude that Congress intended no exception for this situation. Against this background, we argue that the language of Section 8 (b) (4) (A) and (B) may properly be construed as banning union inducement of employee refusals to work on disfavored goods irrespective of whether the employer has acquiesced in the refusal.

A. CONGRESS INTENDED TO PROSCRIBE PRODUCT BOYCOTTS OF THE TYPE INVOLVED HERE, EFFECTED BY WORK STOPPAGES OF EMPLOYEES

This Court pointed out in *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U. S. 675, 686, that, although "§ 8 (b) (4) does not expressly mention 'primary' or 'secondary' disputes, strikes or boycotts, that section often is referred to in the Act's legislative history as one of the Act's secondary boycott sections'."[11]

[11] The other section, the Court added, "is § 303 [of the Labor Management Relations Act, 1947], which uses the same language in defining the basis for private actions for damages caused by these proscribed activities" (*ibid.*).

Thus, in a passage quoted by the Court (*ibid.*), Senator Taft, who was the sponsor of the bill in the Senate, said, in discussing this section (93 Cong. Rec. 4198, 2 Leg. Hist. 1106):

> * * * under the provisions of the Norris-LaGuardia Act it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.

The refusal of employees to handle the goods of another employer, merely because they were produced under conditions disfavored by the union, was a practice which witnesses before the Senate Labor Committee repeatedly urged should be outlawed as a secondary boycott. For example, Roland Rice, General Counsel of the American Trucking Association, describing a situation similar to that presented in this case, complained that (Hearings before the Senate Committee on Labor and Public Welfare, on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess., p. 383):

> * * * organized labor has used the trucking industry as an effective tool in forcing the

unionization of workers in manufacturing and processing plants. If such plants are to operate they must have the raw materials or partly finished products brought to them and the completed products taken away. Much of this transportation is performed today by motortruck. It is a very easy thing to force unionization of workers in these plants by the simple expedient of placing them on an unfair list, and thus denying them the use of motortruck transportation. * * *.

* * * * *

The gravity of this situation cannot be understood unless we remember the effect upon the trucking company which is not at all involved in the controversy, and also upon the numerous consignors and consignees whose freight is tied up because of a conflict with which they have absolutely nothing to do. * * *.

Similarly, Fentress Hill of the Northern Redwood Lumber Company described how the United Brotherhood of Carpenters, in an effort to obtain a closed shop in the lumber yards and thereby unseat the CIO, had classified all lumber produced in a CIO mill as "hot cargo" and directed its members throughout the country not to use or install "any material produced or manufactured from wood not made by members of the United Brotherhood" (Hearings, *supra*, pp. 1718, 1732–1733). And R. S. Edwards of the National Electrical Manufacturers Association testified that Local 3 of the IBEW had obtained a monopoly position in the electrical products field in New York City by the device of directing its members who installed such products not to handle products

manufactured by firms employing electricians who were not members of Local 3 (Hearings, *supra*, p. 177).

Congress had these incidents specifically in mind in enacting the secondary boycott provisions of the Act and intended that these provisions would cover and prohibit such product boycotts, when effected through work stoppages of employees. This is shown by the colloquy between Senator Pepper and Senator Taft, wherein the former opposed Section 8 (b) (4) (A) on the ground that it would bar unions from protecting the standards which they had built up by calling "upon other workers to cooperate, to refuse to work to increase the value of the product of the employer who deals unfairly with them" (93 Cong. Rec. 4198, 2 Leg. Hist. 1106). Senator Taft agreed that the law was to be changed in this respect, because "if that sort of thing is encouraged there will be hundreds and thousands of strikes in the United States * * * there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes" (93 Cong. Rec. 4198, 2 Leg. Hist. 1107). Illustrating this point, Senator Taft added that Senator Pepper would permit, but Section 8 (b) (4) (A) was intended to stop (93 Cong. Rec. 4198–4199, 2 Leg. Hist. 1107–1108):

> * * * the case of the New York Electrical Workers' Union, which said, "We will not permit any material made by any other union or by any nonunion workers to come into New York City and be put into any building in New York City." * * *

> * * * [the situation where all] over the United States, teamsters are saying, "We will not handle this lumber, because it is made in a plant where a CIO union is certified." * * *
>
> * * * [the situation where] all over the United States, carpenters are refusing to handle lumber which is finished in a mill in which CIO workers are employed, or, in other cases, in which American Federation of Labor workers are employed.[12]

And, at another point in the legislative debate, Senator Taft, in explaining Section 8 (b) (4) (A), stated (93 Cong. Rec. 4867, 2 Leg. Hist. 1388):

> * * * we are dealing with the checking of deliveries through secondary boycotts or jurisdictional strikes. * * * The trouble is that the man drives up to the delivery point, and because the teamsters' union says that he does not have a teamster's card, then the union in the plant, the unloaders or longshoremen, or whatever they may be will not unload his truck. That is what we are trying to reach in this case. * * *

B. CONGRESS WAS AWARE THAT EMPLOYEE REFUSALS TO HANDLE DISFAVORED PRODUCTS WERE OFTEN ACQUIESCED IN BY THE EMPLOYER, EITHER THROUGH "HOT CARGO" AGREEMENTS OR OTHER ARRANGEMENTS WITH THE UNION

At the time that Congress was considering the product boycotts described above, the practice of securing employer consent in advance of the em-

[12] Senator Morse characterized the latter two situations as "hot cargo" cases, 93 Cong. Rec. 4863, 2 Leg. Hist. 1380. See, also, 93 Cong. Rec. 4131–4132, 2 Leg. Hist. 1056 (Senator Ellender); S. Rep. No. 105, 80th Cong., 1st Sess., p. 22, 1 Leg. Hist. 428.

ployees' refusal to handle disfavored goods, by means of a "hot cargo" clause in the collective bargaining contract, was a well known method of effecting these boycotts. Thus, a compilation of collective bargaining contracts for the years 1926 and 1927, made by the Bureau of Labor Statistics, shows that, even then, there were contracts with clauses permitting the employees represented by the union to refuse to work on "an unfair job," on "nonunion material" or on "work destined for an unfair employer."[13] By 1942, when the Bureau published its next study, clauses of this type had become more widespread, the Bureau reporting that:[14]

> * * * it is often provided in agreements that the employer may not require employees to work on material coming from or destined for manufacturers not operating under union agreements. Other agreements limit the prohibition to material coming from employers who have been declared "unfair" to organized labor by an affiliated union * * *. Another alternative * * * prohibits work on materials coming from or destined for manufacturers whose employees are on strike * * *.

Moreover, obtaining employer acquiescence has long been common practice in the programs of the United Brotherhood of Carpenters and the International

[13] Bulletin No. 448, *Trade Agreements 1926*, United States Bureau of Labor Statistics (Gov't Print. Off., 1927), p. 7; Bulletin No. 468, *Trade Agreements 1927* (Gov't Print. Off., 1928), p. 6.

[14] Bulletin No. 686, *Union Agreement Provisions*, United States Department of Labor, Bureau of Labor Statistics (Gov't Print. Off., 1942), p. 32.

Brotherhood of Teamsters, the unions involved in the incidents brought to Congress' attention (pp. 23–26, *supra*), and the parent bodies of the locals involved in this case and the companion cases, Nos. 127 and 412. Since early in 1900, the United Brotherhood of Carpenters has implemented its union label policy by arrangements and agreements with the contractors and other employers of its members.[15] Similarly, for many years the International Brotherhood of Teamsters has, by contract and otherwise, obtained the cooperation of the employers already organized by it in its further organizing efforts.[16]

Congress was aware of how these unions operated, well before the enactment of the Taft-Hartley amendments. The drive by former Assistant Attorney General Thurman Arnold to apply the antitrust laws to

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[15] See Christie, *Empire in Wood, a History of the Carpenters' Union* (Cornell, 1956), pp. 161–169, 301–304, 312–313; *United States* v. *Brims*, 272 U. S. 549; *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 469–470; *Bossert* v. *Dhuy*, 221 N. Y. 342, 117 N. E. 582; *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 399.

[16] See Leiter, *The Teamsters' Union* (Bookman Associates, 1957), pp. 175, 249, 264; Hill, *Teamsters and Transportation* (American Council on Public Affairs, 1942), pp. 202–203; Gillingham, *The Teamsters Union on the West Coast* (Institute of Industrial Relations, Univ. of Cal., 1956), pp. 13, 48; Bulletin No. 448, *op. cit.*, p. 196; Bulletin No. 468, *op. cit.*, p. 202; *International Brotherhood of Teamsters, Local 294 (Rabouin d/b/a Conway's Express)* 87 NLRB 972, 1020. An examination of approximately 60 Teamsters' collective bargaining contracts negotiated prior to the enactment of the 1947 amendments to the Act, which were made available by the U. S. Department of Labor, Wages and Industrial Relations Division, revealed that most of them, as here, contained clauses permitting employees to refuse to handle "unfair goods."

the restrictive practices of the unions in the building trades,[17] which commenced in the fall of 1939 and tapered off in 1941 as a result of the decision in *United States* v. *Hutcheson*, 312 U. S. 219, had emphasized the practices of the Carpenters.[18] And in April and May of 1942, after *United States* v. *Local 807, International Brotherhood of Teamsters*, 315 U. S. 521, made plain that the "organizing" tactics of the Teamsters were not subject to regulation under the Anti-Racketeering Act, a Subcommittee of the House Judiciary Committee, headed by Congressman Hobbs, held hearings on bills to amend that Act and to outlaw "illegitimate" labor activities, including secondary boycotts.[19] Witnesses before the Subcommittee repeatedly described the Teamsters' practice of forcing recognition from employers whose employees they did not represent by labeling the employer's products as "hot cargo," with the result that trucking firms, employing Teamsters members, would not handle those products.[20] The passage, in June 1941, of the Cali-

[17] See Arnold, *The Bottlenecks of Business* (Reynal and Hitchcock, 1940), pp. 42, 196–200; 240–259.

[18] See Christie, *op cit.*, pp. 308–315; Proceedings of the Twenty-Fifth General Convention of the United Brotherhood of Carpenters and Joiners of America (April 22–30, 1946), pp. 254–255.

[19] Hearings before Subcommittee No. 3 of the House Judiciary Committee, *Injunctions Against Illegitimate Labor Practices and Outlawing Racketeering*, 77th Cong., 2d Sess., Serial No. 17.

[20] Hearings, n. 19, *supra*, pp. 8, 44–46, 50. One of the witnesses was Joseph B. Eastman, Director of the Office of Defense Transportation, who submitted a lengthy list of cases, taken from the files of the Interstate Commerce Commission, in which unionized motor carriers had refused to pick

fornia statute outlawing "hot cargo" and "secondary boycotts" served further to highlight the existence of "hot cargo" clauses and their use by the Teamsters.[21]

In these circumstances, it is clear that when, in 1947, Congress finally adopted legislation covering product boycotts,[22] it recognized that these boycotts were frequently carried out under cover of "hot cargo" clauses and other forms of employer acquiescence.

C. THERE IS EVERY REASON TO CONCLUDE THAT CONGRESS INTENDED NO EXCEPTION FOR THE SITUATION WHERE THE EMPLOYEE'S REFUSAL WAS ACQUIESCED IN BY THE EMPLOYER

In view of Congress' desire to proscribe all secondary boycotts effected by work stoppages of em-

up or deliver freight to firms declared "hot" by the Teamsters. Hearings, pp. 336–369; Leiter, *op. cit.*, p. 249. See also, the testimony of Assistant Attorney General Arnold, Hearings, *supra*, pp. 402–410, 420–424.

[21] This statute was specifically called to the attention of the Hobbs Subcommittee, Hearings, n. 19, p. 29, *supra*, pp. 135–136. The statute was subsequently held to be unconstitutional by the Supreme Court of California on the ground that it was so vaguely drawn that it appeared to sweep within its ban not only union secondary activities, but also legitimate primary picketing and other activity which the court believed to be protected by the First Amendment. *Ex parte Blaney*, 184 P. 2d 892.

[22] No legislation resulted from the 1942 hearings of the Hobbs Subcommittee. However, the secondary boycott activities there disclosed led to numerous proposals in succeeding sessions of Congress for curbing such activities, culminating in the Case Bill of 1946, the immediate forerunner of the Taft-Hartley amendments. See pp. 43–45, *infra;* Millis and Brown, *From Wagner Act to Taft-Hartley* (Univ. of Chi., 1950), pp. 356–362. The only measure which was enacted during this period was the Hobbs Amendment to the Anti-Racketeering Act (July 1943), which was aimed at extortion by labor unions. See Leiter, *op. cit.*, p. 251.

ployees, without distinguishing between "good secondary boycotts and bad secondary boycotts" (Senator Taft, p. 23, *supra*, and its awareness that such boycotts were frequently carried out with the acquiescence of the employer, it cannot be supposed that Congress contemplated an exception for the latter situation. Since clauses purporting to exempt employees from handling or working on products (or under conditions) disfavored by the union cover a wide variety of situations,[23] recognition of the factor of employer acquiescence as decisive would remove a substantial amount of secondary boycott activity from the reach of Section 8 (b) (4) (A) and (B). And in two cases which Congress repeatedly cited—the New York City case involving the Electrical Workers (p. 25, *supra*), and a San Francisco case involving the Carpenters (1 Leg. Hist. 427; 2 Leg. Hist. 1537, 1622)—the unions not only had the consent, but the active cooperation of the employer.[24] Moreover, an exception for employee work stoppage acquiesced in by the employer would be incompatible with the broad protection which Section 8 (b) (4) (A) and (B) was intended to provide. We turn to these considerations.

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[23] See p. 27, *supra;* Bulletin No. 908–13, *Collective Bargaining Provisions*, United States Department of Labor, Bureau of Labor Statistics (Gov't Print. Off., 1949), pp. 38–45; Collective Bargaining Negotiations and Contracts (Bureau of National Affairs, Washington, D. C.), pp. 77: 5, 77: 352–353.

[24] See *Allen Bradley Co.* v. *Local Union No. 3, International Brotherhood of Electrical Workers*, 325 U. S. 797; *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 399.

1. *Section 8 (b) (4) (A) and (B) was not enacted solely for the benefit of the secondary employer through whose employees the boycott is effected*[25]

In banning secondary boycotts, Congress, to be sure, proposed to protect against disruption the business of the particular secondary employer whose employees would be the immediate target of the union's inducement, *e. g.*, the motor carriers here.[26] But such boycotts affect, in addition to the secondary employer, the other employers who do business with that employer, the public generally, and the primary employer.[27] Congress intended to safeguard these other interests as well.

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[25] Although, as indicated p. 9 n. 5, *supra*, the Board members have varying views as to why a "hot cargo" clause does not privilege conduct otherwise within the purview of Section 8 (b) (4) (A) and (B), they all accept, and start from the underlying premise that the purpose of the section is to afford protection to all employers and persons affected by a secondary boycott, including the general public. See *Local 1976, United Brotherhood of Carpenters (Sand Door and Plywood Co.)*, 113 NLRB 1210, 1216, 1219; *Truck Drivers Local Union No. 728 (Genuine Parts Company)*, Appendix B, pp. 93-94, *infra*.

[26] As Senator Taft stated (93 Cong. Rec. 4198, 2 Leg. Hist. 1107): "There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions," and the only basis for complaint is that "their employer happens to be doing business with someone the union does not like or with whom it is having trouble or having a strike."

[27] For example, assuming that a shipment of American Iron oil field equipment passed from one of the carriers here (A) to an intervening carrier (B), who in turn made delivery to the ultimate purchaser (C), the refusal of A's employees would affect not only the business of A, but would also require B

The underlying theory of the Act itself suggests that protection of the public was an important consideration in the enactment of the ban on secondary boycotts. For, as this Court has long recognized, the Act creates "public" and not "private" rights; the "Board as a public agency acting in the public interest * * * is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265.[28] The preamble to the Labor Management Relations Act of 1947 (Section 1 (b)), Title I of which contains the amendments to the Act, provides in relevant part that: "It is the purpose and policy of this Act, in order to promote the full flow of commerce * * * to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with

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to discontinue handling, and C to discontinue using, American Iron products; in addition, the inability of C to get the American Iron equipment might well curtail the supply of oil and thereby adversely affect the public generally. Similarly, in No. 127, the refusal of the carpenters to install prefinng doors had an impact beyond Haystad and Jensen (the subcontractor employing the carpenters), affecting, *inter alia*, the sales of these doors by Sand Door and Watson and Dreps, the distributors who handled the doors on their way from the manufacturer to the contractor. And in No. 412, the refusal of the milk dealers to handle Crowley's products necessarily had an impact on the consuming public, and put pressure on Crowley's, the primary employer, to recognize the union.

[28] See, also, *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 362–364, 366; *Garner* v. *Teamsters Union*, 346 U. S. 485, 492–496.

labor disputes affecting commerce." As shown above (p. 25), Senator Taft, illustrating the need for the secondary boycott provisions, pointed out that, if employees were permitted to strike merely because their employer handled disfavored goods, "there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes." Similarly, Representative Landis, one of the managers of the bill in the House, justified a ban on secondary boycotts on the ground that (93 Cong. Rec. A-1222, 1 Leg. Hist. 583): "Secondary boycotts have had the effect of throwing a great many innocent people out of work. As a result of these secondary boycotts many of our citizens have been deprived of milk, bread, meat, fruits, vegetables, and other essentials of life." Moreover, in explaining the addition to the Act of Section 10 (l), which empowers and directs the Board to apply for immediate injunctive relief against conduct which appears to be violative of Section 8 (b) (4), the Senate Report states (S. Rep. No. 105, 80th Cong., 1st Sess., p. 8, 1 Leg. Hist. 414):

> Because of the nature of certain * * * practices, especially jurisdictional disputes, and *secondary boycotts* * * * for specifically defined objectives, the committee is convinced that additional procedures must be made available under the National Labor Relations Act *in order adequately to protect the public welfare which is inextricably involved in labor disputes.*
>
> * * * * *
>
> Hence we have provided that the Board, *acting in the public interest and not in vindication of purely private rights*, may seek injunctive relief

> In * * * the case of *strikes and boycotts defined as unfair labor practices.* [Emphasis added.]

Furthermore, the attempts by Senators Ball and Aiken to permit the farmer and the small businessman affected by a secondary boycott to secure injunctive relief without first resorting to the Board likewise show that the secondary boycott provisions were not designed merely for the benefit of the particular secondary employer whose employees are engaged in the boycott, but also for the protection of other employers and persons, including the primary employer. Thus Senator Ball, in proposing an amendment which would have provided a private injunctive remedy against such activity, stated (93 Cong. Rec. 4835–4836; 2 Leg. Hist. 1350):

> * * * in the great majority of cases a secondary boycott or a jurisdictional strike is conducted simply by employees of employer A, B, or C grouped into a union and assuming for themselves a prerogative for using their economic force to dictate to the employees of employer X the terms and conditions under which those employees shall work. The employees are the primary objective and the primary victim for secondary boycotts and jurisdictional strikes. * * * [A] great many employers are the secondary victims, and quite a number of them have been driven out of business by such practices.
>
> * * * the pending amendment would simply give to those employees and to their employers the right to go directly into court to protect their right to freedom from this kind of racketeering pressure * * *.

He added (93 Cong. Rec. 4838, 2 Leg. Hist. 1354):

> As I said before, farm producers and small businesses and their employees are the main victims of secondary boycotts, jurisdictional strikes, and organizational boycotts. * * * [They] do not have the resources to enable them to last out the 2 to 6 weeks' delay which would intervene before they could possibly get relief under the committee bill. It is such persons and their rights that we are trying to protect.

Making a similar proposal, Senator Aiken explained that (93 Cong. Rec. 4860, 2 Leg. Hist. 1375):

> We have had reports for many years of cases involving farmers who have worked through the year raising a crop and have taken it to market, only to run into a secondary boycott or a jurisdictional strike in existence at the place at which they were supposed to deliver the crop. Consequently they have lost it. * * *
>
> For that reason I * * * provide that * * * the farmer * * * may appeal to the courts for an injunction * * *.[29]

These proposals were rejected only after Senator Taft offered the substitute permitting persons injured by secondary boycotts to sue for damages, as well as obtain injunctive relief through the Board (Section 303 of the Labor Management Relations Act; 93 Cong. Rec. 4843, 4858, 2 Leg. Hist. 1365, 1370–1371). See *DiGiorgio Fruit Corp.* v. *National Labor Relations Board*, 191 F. 2d 642, 644–645 (C. A. D. C.), cer-

[29] See also, S. Rep. No. 105 on S. 1126 (Supplemental Views), p. 54, 1 Leg. Hist. 460.

tiorari denied, 342 U. S. 869; *United Brick & Clay Workers* v. *Deena Artware, Inc.*, 198 F. 2d 637, 643–644 (C. A. 6), certiorari denied, 344 U. S. 897.[30]

The broad purpose of the secondary boycott provisions is further attested by the way in which Section 8 (b) (4) (A) and (B) defines the proscribed objects. The illegal object specified in subsection (A) is "forcing or requiring * * * *any employer or other person*" to cease doing business with another. (Emphasis added.) This language comprehends not only the employer whose employees may be induced by the union, but other employers and persons who use or handle the "hot goods" (see n. 27, p. 32, *supra*). Similarly, subsection (B) defines the illegal object as "forcing or requiring *any other* employer to recognize or bargain with a labor organization" unless such labor organization has been certified by the Board. (Emphasis added.) The words "any other employer" obviously refer to the employer with whom the union has its primary dispute (here American Iron), the

[30] Cf. *National Labor Relations Board* v. *Associated Musicians*, 226 F. 2d 900, certiorari denied, 351 U. S. 962, where the Second Circuit recognized that the secondary boycott provisions of the Act were intended to protect the primary employer, and not solely the secondary employer immediately involved, when it rejected the contention "that the business of the primary employer should not be considered in determining jurisdiction of secondary boycotts" (p. 907). The Court stated (*ibid.*): "We think the better view is that the secondary activity is but an extension of the labor dispute with the primary employer and that the businesses of both employers are to be considered in determining jurisdiction of the secondary activity."

purpose of the subsection being to bar secondary pressure on him to grant recognition.[31]

In sum, by Section 8 (b), (4) (A) and (B), Congress attempted "to narrow the area of industrial strife, and thus to safeguard the national interest in the free flow of commerce * * *." It has done so by broadly sweeping within the Section's "prohibition an entire pattern of industrial warfare deemed by Congress to be harmful to the public interest"—one phase of this pattern being the type of product boycott involved here. *Printing Specialties and Paper Converters Union, Local 388* v. *LeBaron*, 171 F. 2d 331, 334 (C. A. 9). Congress believed that the public interest would best be served by confining the "area of industrial strife", insofar as possible, to the employer with whom the union had its primary dispute and by precluding the union from enlisting the aid of the employees of other secondary employers. To the extent that these secondary employers might be "neu-

[31] Section 10 (b) of the Act, which permits a charge to be filed by "any person" (cf. *Teamsters Union* v. *New York, N. H. & Hartford Railroad Co.*, 350 U. S. 155, 160), insures that any employer or individual affected by a secondary boycott may invoke the protection of Section 8 (b) (4) (A) and (B). In this case, the charge was filed by the primary employer, American Iron (R. 2, 11); in No. 412 the charge was also filed by the primary employer (Crowley's Milk); but in No. 127 the charge was filed by Sand Door and Plywood Company, a secondary employer whose business was affected by the boycott. See, also, Section 303 (b) of the Labor Management Relations Act, 1947, which, in providing for suits for damages in respect to the same conduct made an unfair labor practice under Section 8 (b) (4) (p. 36, *supra*), permits such suit to be instituted by "[w]hoever shall be injured in his business or property by reason of" the illegal activity.

trals," Congress desired to avoid having them involuntarily conscripted, through the action of their employees, into the union's dispute with the primary employer. However, Congress' concern was not so narrowly circumscribed or limited solely to this situation. For, even where the conscription of the secondary employer was not involuntary—where, for example, he had a "hot cargo" agreement with the union—the boycott would nevertheless affect other persons wholly unconcerned in the union's dispute with the primary employer,[32] and would exert leverage on the primary employer to accede to the union's demands. Congress concluded that, apart from the desires of the secondary employer immediately involved, it was not fair to these persons or to the public to permit the union to use "secondary" weapons to further its side of the dispute with the primary employer.

2. *To sanction employee refusals acquiesced in by the employer would obliterate the protection intended for the other interests*

The compelling evidence that Section 8 (b) (4) (A) and (B) was enacted for the benefit of persons in addition to the secondary employer immediately involved leads necessarily to the conclusion that Congress

[32] Hence, even if the acquiescence of the secondary employer whose employees were induced by the union removed him from that category, Section 8 (b) (4) (A) and (B) would still be according protection to "the business of a third person who is *wholly unconcerned* in the disagreement between an employer and his employees." 93 Cong. Rec. 4198, 2 Leg. Hist. 1106 (Senator Taft; emphasis added). See, also, 95 Cong. Rec. 8709. In any event, as we have shown (pp. 32–37, *supra*), this description is merely illustrative of, and not exhaustive of, the purposes of the section.

did not intend an exception for the situation in which the secondary employer acquiesces in the employee refusal. For, "if the purpose of the Act is broader, to protect the interest of the others, whether the employer who is the union's primary objective, or the public at large, then, obviously contractual waiver by [one] party * * * could be of no moment." *Alpert* v. *United Brotherhood of Carpenters*, 143 F. Supp. 371, 374–375 (D. Mass.).[33] Otherwise, the other interests sought to be safeguarded by Section 8 (b)(4) (A) and (B) would be obliterated without the consent of the persons affected. The section, *person" to cease doing business with another.* [Emcontrary to the manifest legislative purpose, would be limited to the function of protecting the interests of the secondary employer directly involved in the boycott.

D. THE LANGUAGE OF SECTION 8 (b) (4) (A) AND (B) MAY BE CONSTRUED IN A MANNER CONSISTENT WITH THE SECTION'S LEGISLATIVE HISTORY AND THE CONGRESSIONAL OBJECTIVES

In the light of the considerations set forth above, pp. 22–40, we turn to the language of Section 8 (b)(4) (A) and (B). As noted at the outset (pp. 17–18; 19, n. 8, *supra*), it proscribes a union from inducing or encouraging employees to engage in "a strike or a concerted refusal in the course of their employment," for an object (A) of "forcing or requiring * * * any employer or other person" to cease handling the

[33] See, also, *Douds* v. *Milk Drivers and Dairy Employees Union Local 584*, 40 LRRM 2669, 2672 (C. A. 2, concurring opinion of Lumbard, J.); *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932, 936 (C. A. 6).

products of or doing business with any other person, or (B) of "forcing or requiring any other employer" to recognize a labor organization as the representative of its employees though that organization has not been certified by the Board. The court below (and similarly the Second Circuit in *Milk Drivers and Dairy Employees Local Union No. 338 v. National Labor Relations Board*, 245 F. 2d 817, petition for writ of certiorari pending, No. 412, this Term) concluded that, despite the showing of a broad Congressional purpose to reach "secondary" weapons, this language imports the factor of employer non-consent into Section 8 (b) (4) (A) and (B). In its view, employees cannot be said to "strike" or concertedly refuse "in the course of their employment," or to "force or require" action on the part of any employer, when their refusal to work has been consented to by the employer in a "hot cargo" agreement with the union.[34] This conclusion, we submit, is erroneous.

1. *The language of Section 8 (b) (4) (A) and (B) does not limit the section to situations where the work stoppage is opposed by the employer*

To read the language of Section 8 (b) (4) (A) and (B) as covering only such work stoppages as are without the consent of the employer, is to construe the section in a "spirit of mutilating narrowness"

[34] As summed up by the Second Circuit (245 F. 2d at 820), the "language is clear: there is no violation of § 8 (b) (4) unless the union encourages the employees to *coerce* the secondary employer. Where the employees are encouraged only to exercise a valid contractual right to which the employer has agreed there is no coercion."

(*United States* v. *Hutcheson*, 312 U. S. 219, 235). Reading the language, instead, so as to give "hospitable scope" to Congress' purpose (*ibid;* and see *Black* v. *Magnolia Liquor Co.*, No. 14, this Term, decided November 12, 1957), it does not import into the statute the requirement that the employee refusal induced by the union be opposed by the employer.[35]

Although the terms "strike" and "concerted refusal" usually presuppose action which is contrary to the employer's will (see the dissenting opinion of Judge Prettyman, R. 201), it does not follow that these terms, at least the term "concerted refusal," can only be interpreted in this manner. Literally, the union induces a concerted refusal by employees, in the course of their employment, to perform work whenever it requests them, while on the job, not to perform a task. In this sense, it is irrelevant whether the employer has consented to the refusal or not, the significant fact being that the union has encouraged it. In other words, a refusal directed against the goods or the work task, rather than against the employer, would satisfy the statutory requirement of a "concerted refusal" by employees.

Giving the term "concerted refusal" this interpretation is justified because it achieves the broad Congressional purpose and avoids the consequences, de-

[35] Preliminarily, it may be noted that the language contains no express qualification for cases in which the inducement is pursuant to a "hot cargo" clause or otherwise consented to by the employer. Compare the proviso to Section 8 (a) (3), where Congress, when it desired to except private contractual arrangements from the Act's provisions, said so specifically. See, also, the provisos to Sections 8 (a) (2), 8 (b) (1) (A), and 8 (b) (4) (D).

structive of that purpose which would flow from reading the term as comprehending only those refusals which are opposed by the employer. For the latter reading results, as noted above, in foreclosing the other interests sought to be safeguarded by Section 8 (b) (4) (A) and (B), without the consent of those affected. Moreover, interpreting the term "concerted refusal" as not requiring that the refusal coerce the employees' employer is consistent with the fact that it "was the *objective* of the union's secondary activities * * * and not the *quality of the means* employed to accomplish that objective, which was the dominant factor motivating Congress in enacting [Section 8 (b) (4) (A) and (B)]." *International Brotherhood of Electrical Workers* v. *National Labor Relations Board,* 341 U. S. 694, 704, quoting with approval from *United Brotherhood of Carpenters,* 81 NLRB 802, 812. That is to say, just as the "substitution of violent coercion in place of peaceful persuasion would not in itself" bring primary picketing within the reach of Section 8 (b) (4) (A) or (B) (*National Labor Relations Board* v. *International Rice Milling Co.,* 341 U. S. 665, 672), so, also, coercion of the employer is irrelevant to the question whether a refusal by his employees constitutes a "concerted refusal" within the meaning of the section.

In addition, there is persuasive evidence that Congress viewed the term "concerted refusal" as covering employee refusals acquiesced in by the employer, adding the term "strike" to insure that the ban on secondary boycotts would also reach employee refusals which the employer opposed. Thus, the Case Bill,

which was the forerunner of the Taft-Hartley amendments to the Act,[36] contained, as it left the House, a provision banning secondary boycotts, which, in relevant part, read as follows (H. R. 4908, 79th Cong., 2d Sess., Sec. 13 (a)):

> * * * it shall be unlawful (1) by means of a concerted refusal to use, handle, or otherwise deal with articles or materials produced or manufactured by any person, to induce or require or to attempt to induce or require another person to recognize, deal with, comply with the demands of, or employ members, of any labor organization; * * *

In the Senate, Senators Ball, Taft and Smith (who, in the next session of Congress, were instrumental in securing adoption of the Taft-Hartley amendments), tried to achieve the same result by making it a violation of the antitrust laws for a labor organization (S. Rep. No. 1177, 79th Cong., 2d Sess., Part 2, p. 14):

> by strikes, or threats of strikes, * * * or by concerted refusal to use, handle, transport, or otherwise deal with specified articles or materials, to force or require any employer, or any other individual, corporation or partnership to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer.[37]

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[36] See Millis and Brown, *From the Wagner Act to Taft-Hartley* (Univ. of Chi., 1950), pp. 360-362; n. 22, p. 30, *supra*.

[37] The report accompanying this amendment states that the provision would make all secondary boycotts by unions in restraint of commerce unlawful, and adds: "The secondary boycott takes many forms, from the *'hot cargo' embargo used*

In explaining why this proposal, unlike the House version, added the word "strikes" to "concerted refusal," Senator Ball stated (92 Cong. Rec. 5724):

> We had to include the word "strikes" because obviously if the construction union says, "We will put on our unfair list this product made by General Electric or Westinghouse; we will not use it," and the employer says, "Well, I will go along," and he merely stacks it up in the corner, that is a concerted refusal to use. But if the employer says, "You use these, or else you are through working for me," and the workers strike, that is just as effective as a concerted refusal to handle, and there must be included in this picture the use of the strike weapon where it is used to enforce a secondary boycott. * * *.

Interpreting "concerted refusal" as covering all union-induced employee refusals, whether or not approved by the employer, does not clash with Section 8 (b) (4)'s requirement that the employees' concerted refusal be "in the course of their employment." The phrase "course of their employment" need not be regarded as merely a definition of the work tasks which the employer has consented to have his employees perform. Since Congress did not wish, by Section 8 (b) (4) (A) and (B), to interdict union appeals to the public (which, of course, includes individuals who are employees) to refrain from patronizing disfavored

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by the teamsters unions, to the refusal of unions to handle goods made by nonunion employees or even by employees belonging to a rival union. * * *." S. Rep. No. 1177, 79th Cong., 2d Sess., Part 2, p. 14. (Emphasis added.)

employers or purchasing their products (see *National Labor Relations Board* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 68 (C. A. 2)), there is good reason to conclude that "in the course of employment" was inserted "to distinguish between employees in their capacity as employees and employees in their capacity as consumers." *Local 1976, United Brotherhood of Carpenters (Sand Door and Plywood Co.)*, 113 NLRB 1210, 1217, quoted with approval in *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932, 936 (C. A. 6). Similarly, as shown by *Joliet Contractors Ass'n* v. *National Labor Relations Board*, 202 F. 2d 606, 609 (C. A. 7), certiorari denied, 346 U. S. 824, the term serves the function of excluding from Section 8 (b) (4) (A) and (B) employee refusals to work which occur "prior to the establishment of an employer-employee relationship." Moreover, as Judge Prettyman pointed out in his dissent herein (R. 202–203), to interpret the phrase "in the course of their employment" as a reference to the work tasks which the employer has hired his employees to perform would permit the parties to give legality to all kinds of acts forbidden by the statute by the simple device of fixing the scope of employment, *e. g.*, a contract provision exempting from the course of employment concerted refusals to perform services for the purpose of forcing an employer to assign work to one class of employees rather than to another—conduct which would otherwise violate the ban against jurisdictional strike action contained in Section 8 (b) (4) (D) of the Act. See, also,

Genuine Parts Company, Appendix B, pp. 97–98, *infra*.

Nor are the proscribed objects defined in subsections (A) and (B) of Section 8 (b) (4) limited to situations where there is coercion of the employer whose employees have been induced by the union. As we have shown (pp. 37–38, *supra*), the proscription contained in those subsections has meaning irrespective of the acquiescence of that particular employer. Thus here, even assuming that in view of the "hot cargo" clauses there may have been no "forcing or requiring" of the motor carriers themselves,[38] the refusal of their employees to handle American Iron freight did "force or require" other persons to stop handling American Iron products (see n. 27, p. 32, *supra*). Similarly, in No. 127, even assuming that the refusal of the carpenters to handle prehung doors may have been voluntarily acquiesced in by their employer, the refusal did "force or require" Sand Door and Watson and Dreps, who did not consent, to curtail their shipments of these doors (*ibid.*). In No. 412, despite the assumed acquiescence of the milk dealers, the refusal of their employees to handle Crowley's products achieved the result prohibited by Section 8 (b) (4) (B), *i. e.*, putting pressure on Crowley's (the primary employer) to recognize the union though it had not been certified.

In sum, the language of Section 8 (b) (4) (A) and (B) does not require that, contrary to Congress' evi-

[38] However, insofar as four carriers refused to adhere to the clause, there was compulsion even of them (see pp. 5–7; Judge Prettyman's dissent, R. 201–203).

dent, the reach of the section be confined to situations where the secondary employer is coerced."[39]

[39] The terms "boycott" or "secondary boycott" have been defined in many different ways, sometimes as presupposing coercion of the secondary employer immediately involved, and other times as not. These conflicting and perhaps confusing definitions were, no doubt, among the factors which prompted Senator Taft to say, during the legislative debates (*supra*, p. 23), that the Senate Committee had "never succeeded in having anyone tell us any difference between different kinds of secondary boycotts", and hence "we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice." It is fair to say, we think, that Congress adopted the all-inclusive phrase "forcing or requiring any employer" to avoid any distinction based upon whether or not pressure was exerted on the immediate secondary employer. Cf. *National Labor Relations Board* v. *Wine, Liquor & Distillery Workers Union*, 178 F. 2d 584, 586–587 (C. A. 2); *Printing Specialties and Paper Converters Union, Local 388* v. *LeBaron*, 171 F. 2d 331, 334 (C. A. 9). Laidler, in his classic work, *Boycotts and the Labor Struggle* (N. Y., John Layne Co., 1913) defined a "secondary boycott" as a "combination of workmen to *induce* or *persuade* third parties to cease business relations with those against whom there is a grievance," and uses the term "compound boycott" to refer to a situation "where the workmen use *coercive* and *intimidating* measures, as distinguished from mere persuasive measures in preventing third parties from dealing with the boycotted firm" (p. 64). On the other hand, this Court, in *Duplex Co.* v. *Deering*, 254 U. S. 443, 466, characterized the situation where persuasion is used as a "primary boycott," and reserved the term "secondary boycott" for the situation where coercion is used. Thus, it pointed out that the union action in that case was in substance a "secondary boycott," that is, "a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it" (*ibid.*). Still an-

2. The contentions which may be advanced against this interpretation do not impair its validity

The foregoing interpretation of the language of Section 8 (b) (4) (A) and (B) results in a situation where, assuming that the Act does not invalidate the "hot cargo" clause itself, it would nevertheless preclude the enforcement of that clause by the union through employees. It has been said that this result is anomalous. Apart from the fact that a majority of the Board is now of the view that the "hot cargo" clause itself is invalid (see pp. 55–56, *infra*), at least in the circumstances of this case, we think the criticism unsound.

(a) The court below reasoned that the union presumably paid a consideration for the "hot cargo" clause by concessions at the bargaining table; and that the clause would be rendered virtually worthless if the union could not implement it, when the occasion arose, by appeals to employees. Indeed, the argument runs, to preclude the union from doing so, would be to encourage lawlessness in industrial relations. (R. 198–199, 203.)

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other view is that of Teller, who classifies the type of conduct familiarly known as a labor boycott as "concerted refusal to deal," "efforts at persuasion," and "efforts at coercion." See Teller, *Labor Disputes and Collective Bargaining* (Baker Voorhis, 1940), Vol. 1, pp. 454–457, 448–449. See, also, Frankfurter and Greene, *The Labor Injunction* (MacMillan, 1930), pp. 42–43; Wolman, *The Boycott in American Trade Unions* (Johns Hopkins University Studies in Historical and Political Science, 1916), pp. 10–13; Oakes, *Organized Labor and Industrial Conflicts* (Lawyers Co-Operative Pub. Co., 1927), § 427; Hellerstein, *Secondary Boycotts in Labor Disputes*, 47 Yale L. J. 341 (1938).

But this argument assumes (cf. R. 198, 199) that the secondary boycott provisions of the Act were enacted for the exclusive benefit of the particular secondary employer whose employees have been induced by the union. However, we have established that this premise is erroneous (pp. 32–39, *supra*). Accepting the contrary view that Section 8 (b) (4) (A) and (B) was intended to protect all persons affected by the boycott, including the public, the private contractual arrangements of the union and one of the persons affected cannot be decisive; they must give way to the extent necessary to permit the purposes of the section to be fully effectuated. The fact that one employer has agreed to the inducement and the union has paid a consideration for this agreement cannot privilege the inducement, since it would be felt beyond this employer, affecting the other persons who are entitled to, and have not waived, the benefits of the section. Nor is it significant (as we assume at this point) that the Act may not have banned the "hot cargo" clause as such. For Congress, in requiring a private agreement to yield in order to effectuate a public purpose, can go as far as it believes necessary (see pp. 53–54, *infra*).[40]

(b) The second contention which may be advanced in opposition to the Board's interpretation may be

[40] In other situations where a private contract has been found to impinge on the public rights conferred by the Act, the contract was held to be ineffective only for purposes of the Board proceeding, and no determination was made as to whether it retained validity for other purposes. See *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 365–367.

summarized as follows: Although Section 8 (b) (4) (A) and (B) bans union inducement of employees to engage in a secondary boycott, it does not preclude the union from carrying out its boycott through appeals or threats addressed solely to the *employer*.[21] If the Act does not invalidate the "hot cargo" clause itself, but merely precludes the union from enforcing it through the employees, the union remains free to enforce the clause through the employer, *e. g.*, by appealing to him to order his employees to abide by the contract, or by threatening him with a suit for breach of contract. Since this method of enforcement might also adversely affect other neutral employers and the public, Congress could not have intended to interdict enforcement through employee action.

But, as the Ninth Circuit observed in *National Labor Relations Board* v. *Local 1976, United Brotherhood of Carpenters*, 241 F. 2d 147, 153, now before this Court in No. 127: "An employer may well remain free to decide, as a matter of business policy, whether he will accede to a union's boycott demands, or if he has already agreed to do so, whether he will fulfill his agreement. An entirely different situation, however, is presented * * * when it is sought to influence the employer's decision by a work stoppage of his employees." Thus Congress could have believed that there was little chance that the union's

[21] See *Rabouin d/b/a Conway's Express* v. *National Labor Relations Board*, 195 F. 2d 906, 911-912 (C. A. 2); *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932, 935 (C. A. 6); cf. *Schatte* v. *International Alliance*, 182 F. 2d 158, 165 (C. A. 9).

boycott demand would succeed—with the resultant impact on other parties which Congress sought to avoid—if the union were unable to back up its demand on the employer by threat of work stoppage. Furthermore, even where the employer agrees to the union's boycott demand and accepts a "hot goods" clause, it does not follow that he will share the union's view as to whether a particular case is encompassed thereby. As the facts here show, both Time and Gillette had ordered their men to handle American Iron freight because they had doubts as to whether such freight was "unfair" within the meaning of their contract, and had attempted without success to obtain the Teamsters view on this question (pp. 6–7, *supra*). Moreover, the employer may feel that, notwithstanding the clause, the handling of certain goods is required by supervening law. Gillette, for example, was of the opinion that "according to the Interstate Commerce Commission we had to handle the freight" (R. 145), and the clause itself (R. 187) contained the proviso "provided this is not a violation of the Labor Management Relations Act of 1947." Or the employer may conclude that the business advantage of handling certain "hot goods" outweighs the damages that may be recovered by the union for breach of contract. As Hall's representative testified, his company wished to handle the American Iron freight because "that's what we are in business for" (R. 154).

Congress could well have concluded that such questions concerning the applicability of the "hot cargo"

clause in a particular situation should be resolved by direct negotiation between the employer and the union without strike action pressure, even though the employer may ultimately agree with the union's view. Accordingly, it could reasonably have permitted employer enforcement of "hot cargo" contracts while at the same time banning the union from inducing employees directly. For the employer's decision in a particular case can hardly be a free one when it is made under the pressure of an accomplished work stoppage by his employees.[42]

Finally, it "is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute." *Colgate-Palmolive-Peet Co. v. National Labor Relations Board*, 338 U. S. 355, 363. Whatever may be the situation respecting union-employer action, the statute clearly reaches union inducement of employee work stoppages, and, when such a situation is presented, it cannot be immunized by asserting that

[42] Nor is the Board's view that Section 8 (b) (4) (A) and (B) bars union enforcement of a "hot cargo" clause through employees affected by the fact that, after the enactment of this section, bills were introduced in Congress for the purpose of specifically outlawing boycotts implemented through hot cargo clauses. The first such bill (100 Cong. Rec. 6125, May 6, 1954) was introduced at a time when the Board was still adhering to its *Conway* decision (p. 19, *supra*). In introducing the later bill, its sponsor, Senator Curtis, explained (102 Cong. Rec. 8021–8022, May 14, 1956) that Congress in 1947 had intended to outlaw secondary boycotts irrespective of "hot cargo" clauses and that, although the Board was now of this view, it had not been so originally; he believed that an amendment was necessary to insure that there would be no further doubt, or change of position, on this issue. Cf. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 47.

other situations may have been left free.[43] We submit that it is no more illogical to hold that Section 8 (b) (4) (A) and (B) precludes enforcement of "hot cargo" agreements through employee work stoppages, but leaves open the possibility of employer enforcement, than it is to hold (as do the cases cited in n. 41, p. 51, *supra*) that the section reaches strikes but not strike threats addressed to the employer. Compare, also, the holding in *Joliet Contractors Ass'n* v. *National Labor Relations Board*, 202 F. 2d 606, 608–609, 612 (C. A. 7), certiorari denied, 346 U. S. 824, that union bylaws barring work on preglazed sash are not illegal *per se*, although they furnish inducement for a strike or a concerted refusal to work; however, the bylaws do become violative of the Act when employees, after they have entered into an employment relation, undertake to comply therewith, for then the inducement satisfies the "in course of their employment" requirement of Section 8 (b) (4)."

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[43] "We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46.

[44] The converse position that union enforcement of a "hot cargo" clause is not violative of Section 8 (b) (4) (A) and (B) has its logical difficulties too. For, although this position assumes that such a clause grants immunity from the reach of Section 8 (b) (4) (A) and (B), it leaves open the possibility that a strike to obtain such clause would nevertheless be violative of that section, since it would be seeking objects proscribed thereby. See Note, *Hot Cargo Clauses as Defenses to Violations of Section 8 (b) (4) (A) of the Labor Management Relations Act*, 64 Yale L. J. 1201, 1205; *Chauffeurs, Local Union No. 135 (Pittsburgh Plate Glass Co.)*, 105 NLRB 749, 744, n. 6; cf. *Local 47, International Brotherhood of Teamsters (Texas Industries, Inc. and T. C. Bateson Construction Co.)*, 112 NLRB 923, 935.

E. IN ANY EVENT, IN THE CIRCUMSTANCES OF THIS CASE, THE CONSENT GIVEN IN THE "HOT CARGO" CLAUSE IS LEGALLY INEFFECTIVE BECAUSE THE CLAUSE ITSELF IS INVALID

We also suggest that the statutory requirements would be met here, even if the language of Section 8 (b) (4) (A) and (B) were interpreted as covering only work stoppages *not* consented to by the employer, for the consent manifested in the "hot cargo" clause in this case was not entitled to legal recognition. As pointed out in n. 5, p. 9, *supra*, a majority of the Board is now of the view that a "hot cargo" clause is itself invalid, at least where, as here, the employer-party to the clause is a common carrier subject to the Interstate Commerce Act. Thus, as Chairman Leedom and Member Jenkins explained in their opinion in *Genuine Parts* (Appendix B, pp. 90–94, *infra*), the Interstate Commerce Act, Part II, Section 216 (49 U. S. C. § 316), imposes on common carriers the obligation to serve without discrimination, and a "hot cargo" clause is incompatible with this obligation, for it constitutes advance consent to treat shippers designated "unfair" by the union differently from other shippers. In their view, therefore, even though the National Labor Relations Act may leave a carrier free to enter into a "hot cargo" agreement with a union, the policy of the Interstate Commerce Act, which the Board must take into account, would invalidate such agreement.[45] Moreover, as Member

[45] Cf. *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.*, No. MC-C-1922, Report and Recommended Order issued by ICC Hearing Examiner on April 8, 1957. Oral argument in this case, which involves action of the Teamsters local herein and cooperating motor carriers, was heard by the Interstate Commerce Commission on November 7, 1957 (41 LRR 21).

Rodgers explained in his opinion in *Genuine Parts* (Appendix B, pp. 106–114, *infra*), it is his view that, even though the National Labor Relations Act itself does not specifically prohibit the execution of a "hot cargo" clause, the clause undertakes to secure an exemption for conduct which Congress, in that Act, concluded was inimical to the public interest and required restraint. In his view, therefore, the clause is contrary to the policy of the National Labor Relations Act itself, and invalid under the settled principle that wherever "private contracts conflict with [the Board's] functions, they obviously must yield or the Act would be reduced to a futility." *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 337. Cf. *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 704–705.

If the consent to the "hot cargo" clause should be deemed legally ineffective, it would follow, of course, that the union's conduct in this case constituted a violation of Section 8 (b) (4) (A) and (B). See *National Labor Relations Board* v. *Washington-Oregon Shingle Weavers*, 211 F. 2d 149 (C. A. 9).

II

IRRESPECTIVE OF THE CONCLUSION REACHED UNDER POINT I, THE MACHINISTS' INDUCEMENT OF THE CARRIER EMPLOYEES WAS VIOLATIVE OF SECTION 8 (b) (4) (A) OF THE ACT

A. EVEN IF THE "HOT CARGO" CLAUSE PRIVILEGED THE TEAMSTERS' INDUCEMENT OF THE CARRIER EMPLOYEES, IT DID NOT IMMUNIZE THE MACHINISTS' INDUCEMENT OF THOSE EMPLOYEES

Assuming, contrary to our argument under Point I, that the Teamsters' inducement of the motor carrier

employees was removed from the reach of Section 8 (b) (4) (A) because of the "hot cargo" clause in the carriers' contracts with the Teamsters, it does not follow, as petitioner in No. 324 contends, that the clause also privileged the Machinists' inducement of those employees. We submit that the court below correctly held that the clause did not protect the Machinists union, which was neither a party to the contracts containing the "hot cargo" clause nor the representative of any of the carrier employees.

If a "hot cargo" clause may be said to permit the *contracting* union to induce the employees represented by it not to handle goods covered by the clause, such a conclusion must rest on the view that the terms "strike or a concerted refusal in the course of their employment" presuppose action contrary to the will of the employees' employer. But, assuming, *arguendo*, that the employer, by virtue of the "hot cargo" clause, consented to let the bargaining representative of his employees interrupt their handling of certain goods, there is no reason for assuming that the employer's consent goes so far as to sanction such action on the part of a stranger union.

In the first place, the contracts between the Teamsters and the motor carriers (Teamsters Exh. 1, R. 187) suggest the contrary, referring only to the rights and duties of that union and its members. And the Machinists, when they were attempting to induce the carrier employees not to handle American Iron freight (pp. 4–5, *supra*), did not appear to interpret the scope of the contracts differently, for at no time did they

invoke or purport to rely on the "hot cargo" clause therein.

Secondly, as pointed out in *Douds* v. *Local 707, etc. International Brotherhood of Teamsters*, S. D. N. Y., September 24, 1957 (Herlands, J.):

> The contracting union, as the sole collective bargaining agent for the particular secondary employees, occupies a position vis-a-vis the secondary employer that necessarily excludes the claim of any other of an untold number of unions to invoke the hot cargo clause contained in the collective bargaining agreement * * *. * * * the contracting union is familiar with the conditions prevailing in each union shop. It can make intelligent decisions appropriate to each place of employment. It can determine and evaluate the factors of economic benefit or detriment to itself, its members and the cause of organized labor in general when it decides any course of action. The decision to invoke a hot cargo clause, therefore, is not mechanical or clerical. It is fraught with serious consequences to the employees and their unions, no less than to the affected employer. The secondary employer, his employees and their union must be protected against intermeddlers.

Accordingly, contrary to the view of the dissenting judge below (R. 203-204), the advance consent given in the "hot cargo" clause by the motor carriers cannot properly be regarded as extending to the action of a stranger union like the Machinists. The efforts of that union to induce the carrier employees to refrain from handling goods covered by the clause were not authorized by the carriers. Hence, the Machinists'

action would be subject to Section 8 (b) (4) (A) even if similar action taken by the Teamsters, the contracting union, were not so regarded.

B. THE MACHINISTS' INDUCEMENT OF THE CARRIER EMPLOYEES WAS NOT PRIMARY ACTIVITY, OUTSIDE THE PURVIEW OF SECTION 8 (b) (4) (A)

As *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665, recognizes, the Machinists' picketing at the plants of American Iron (p. 4, *supra*), the employer with whom the union had its dispute, falls outside the purview of Section 8 (b) (4) (A). Although such picketing is not without its impact on neutral employees, it is to be treated as an incident of the union's right to engage in so-called traditional primary activity, which Congress did not intend to preclude. The Machinists' alternative contention is that, since its picketing at the carriers' docks was limited to times when the American Iron truck was making deliveries there and was confined to the vicinity of that truck, this activity, too, must be regarded as traditional primary activity, and thus exempt from Section 8 (b) (4) (A). We submit that the court below correctly concluded (R. 201) that "there is substantial evidence to sustain the findings of the Board" that the Machinists' activity at the carriers' docks was "secondary" and not "primary," its basic purpose being to induce the carrier employees to exert pressure on their employers to cease doing business with American Iron.

Thus, although the separate plants of American Iron afforded the Machinists ample opportunity to reach the non-striking American Iron employees and

to picket that Company, the union extended the picketing to the premises of secondary employers where it would necessarily have an impact on secondary employees. See *National Labor Relations Board* v. *United Steel Workers*, 41 LRRM 2181, 2183–2184 (C. A. 1, December 5, 1957). Moreover, the manner of the picketing, instead of minimizing this impact, accentuated it. The signs worn by Machinists' pickets at the docks, which merely recited that the union was on strike, did not earmark American Iron as the target of the activity (p. 4, *supra*).[46] And on several occasions (pp. 4–5, *supra*) Machinists' representatives expressly requested carrier employees to refuse to handle American Iron freight.[47] Indeed,

[46] Even where, unlike here, the primary employees spend all or most of their working time on a common project with the employees of other employers—so that, as a practical matter, the common project is the only place at which the union may engage in primary picketing—judicially approved Board principles sanction the picketing only if it discloses clearly that the dispute is with the primary employer. See *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 549; *National Labor Relations Board* v. *Truck Drivers etc.*, 228 F. 2d 791, 796 (C. A. 5); *National Labor Relations Board* v. *Chauffeurs, Teamsters, etc.*, 212 F. 2d 216, 218 (C. A. 7); *National Labor Relations Board* v. *Local Union No. 55 etc.*, 218 F. 2d 226, 231 (C. A. 10).

The failure of the picket signs to disclose that the dispute was solely with American Iron, the primary employer, is not cured by the fact that the picketing took place only while the American Iron truck was on the dock, and the truck itself bore the name of American Iron. For, at best, the situation was ambiguous, the truck conveying to the secondary employee the notion that the dispute was limited to American Iron and the signs conveying the notion that the dispute was broader.

[47] That each request may have been made to only one employee at a time does not negate the concerted nature of the action sought. Since "the appeals were to the employees as

Business Representative Foster frankly acknowledged that the picketing at the docks was conducted with the hope that the carriers' employees would refuse to handle American Iron freight (R. 124–125).[48]

In these circumstances, the Board was fully justified in concluding that the Machinists, by picketing at the carriers' docks, were aiming at the carriers and their employees directly, and not merely engaging in primary picketing directed against American Iron.

C. THE BOARD PROCEEDING WAS NOT RENDERED MOOT BY SETTLEMENT OF THE UNDERLYING DISPUTE

The Machinists' strike against American Iron started on September 15, 1954, and the charges initiating the Board proceeding were filed on September 23 and 24 (R. 2, 11). On October 21, two days before a complaint issued on the charges (R. 8, 15), Machinists and American Iron entered into a new contract, whereupon the strike and the attendant picketing ended (R. 31). Machinists contend that these developments rendered the Board proceeding moot

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members of a group, encouraged parallel action, and were not incidental to primary picketing," it "would be artificial to say that the Union did not encourage a unity of effort, and therefore concerted action, on the part of the employees." *Amalgamated Meat Cutters* v. *National Labor Relations Board*, 237 F. 2d 20, 24 (C. A. D. C.), certiorari denied, 352 U. S. 1015. See, also, *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932, 935 (C. A. 6).

[48] Furthermore, it is significant that no attempt was made to picket American Iron trucks delivering freight to J. H. Rose, a non-union freight carrier. It seems clear that the Machinists refrained from picketing at Rose because they knew that, unlike in the case of the unionized carriers, they would not receive the support of Rose's employees. (See R. 119, 150.)

and that it should have been dismissed. The Board and the court below properly rejected this contention (R. 31, 200–201).

Under settled principles, the voluntary cessation of unfair labor practices does not deprive the Board of power to bar a recurrence of those practices by adding the sanction of a Board order. *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U. S. 563, 567–568; *National Labor Relations Board* v. *Pool Manufacturing Co.*, 339 U. S. 577, 581–582; *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 225; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; H. Rep. No. 1371, 74th Cong., 1st Sess., p. 5. The fact that the settlement here may have occurred before the complaint issued does not require a different conclusion, for the stage of the Board proceeding has no bearing on the issue whether it is in the public interest to bar a resumption of unfair labor practices which may reasonably be anticipated, the only question relevant to the propriety of the Board's order. It is not unreasonable to anticipate that, under like circumstances, the Machinists, absent a Board order, may engage in the future in similar secondary activity. Nor can it be assumed that a recurrence of the Machinists' unlawful conduct is unlikely merely because its new contract contains a no-strike clause. Even if such a clause were still in effect,[*] the possibility that it might be disregarded

[*] The contract became effective on September 15, 1954, for a two-year period, subject to automatic renewal thereafter unless renegotiated or terminated on appropriate notice (R. 189–190). The record does not disclose the present status of the contract.

cannot be overlooked. And since the clause contains several exceptions (R. 188), it is apparent that the contract has not eliminated the danger of another strike by the Machinists, accompanied by illegal secondary conduct like that involved here. Cf. *National Labor Relations Board* v. *Oertel Brewing Co.*, 197 F. 2d 59, 62 (C. A. 6).

CONCLUSION

For the reasons stated, the judgment of the court below in No. 273 should be reversed and the cause remanded with directions to enforce the Board's order, and the judgment in No. 324 should be affirmed.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

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National Labor Relations Board.

DECEMBER 1957.

APPENDIX A

The relevant provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. 141, *et seq.*), which include the National Labor Relations Act, as amended, are as follows:

SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

"FINDINGS AND POLICIES

"SECTION 1.

* * * * * * *

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

* * * * * * *

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is

the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; * * *: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * *

(b) It shall be an unfair labor practice for a labor organization or it agents—

* * * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to rec-

ognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

* * * * *

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

SEC. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a par-

ticular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

* * * * *

TITLE V

DEFINITIONS

SEC. 501. When used in this Act—

* * * * *

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

* * * * *

APPENDIX B

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 10-CC-141.

TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 728, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO AND GENUINE PARTS COMPANY

DECISION AND ORDER

On August 9, 1956, Trial Examiner Lloyd Buchanan issued his Intermediate Report in the above-entitled proceeding in which he found that the Respondent Union had not engaged in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act.[1] He recommended, accordingly, that the complaint be dismissed. Thereafter, the General Counsel filed exceptions to the Intermediate Report together with a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. These rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief filed by the General Counsel, and the entire record in the case. It finds merit in the General Counsel's exceptions to the Intermediate Report for reasons more fully indicated below, and hence adopts only those findings and conclusions of the Trial Examiner as to which no exception has been taken.

[1] A copy of the Intermediate Report is attached to this Decision and Order.

1. *The Frame of Reference in Which the Case was Instituted and Litigated, and the Strike Activities of the Respondent Union and its Officials*

The instant proceeding was instituted to remedy a situation in which a large number of motor freight carriers operating out of Atlanta, Georgia, found themselves forced to deny the use of their transportation facilities to Rayloc,[2] a manufacturer and shipper of goods into the stream of interstate commerce. They were placed in this position, because, *inter alia*, the carriers' employees—substantially all of whom were members of the Respondent Union and covered by "hot cargo" clauses in contracts between the carriers and the Union[3]—branded as "hot cargo" the goods offered to the carriers by Rayloc, and refused, on a widespread scale extending to all the carriers, to interline or otherwise to "handle" such goods. The specific facts evidencing the timing and nature of the refusal-to-handle action, and the way such action came about, are as follows:

As a result of economic differences arising during the course of collective bargaining, the Respondent Union, as the representative of Rayloc's employees, called a strike of Rayloc's employees on March 12, 1956. On March 19, 1956, the Union established a picket line at Rayloc's operations. Prior to such strike and the events here made the subject of complaint, Rayloc had its pick-up and delivery work performed by a number of freight carriers in and around

[2] The term *Rayloc* refers to Genuine Parts Company (Rayloc Division), the Charging Employer.

[3] The clauses we refer to as "hot cargo" clauses are described in the contracts as "protection of rights" provisions. Their terms are quoted hereafter. Unless otherwise indicated, the term carriers, as used herein, has reference to carriers who were parties to the area-wide "hot cargo" contracts here involved.

Atlanta. Most of such carriers employ members of the Respondent Union under area-wide contracts containing union-shop provisions and the "hot cargo" clauses. The latter provide as follows:

> It shall not be a violation of this Agreement and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this Agreement. The Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with this or any other Union; and reserve the right to refuse to accept freight from, or to make pickups from or deliveries to establishments where picket lines, strikes, walkout or lockout exist.
>
> The term "unfair goods" as used in this Article includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at any of whose terminals or places of business there is a controversy between such carrier or its employees on the one hand, and a labor union on the other hand; and such goods or equipment shall continue to be 'unfair' while being transported, handled or used by interchanging or succeeding carriers, whether parties to this Agreement or not, until such controversy is settled.
>
> The Union agrees that, in the event the Employer becomes involved in a controversy with any other union, the Union will do all in its power to help effect a settlement.
>
> The Union shall give the Employer notice of all strikes and/or the intent of the Union to strike any Employer and/or place of business, and/or the intent of members' refusal to handle unfair goods. The Carriers will be given an

opportunity to deliver any and all freight in their physical possession at the time of receipt of notice. Any freight received by a carrier up to mid-night of the day of notification shall be considered to be in its physical possession. However, freight in the possession of a connecting Carrier shall not be considered to be in the physical possession of the delivering carrier. The insistence on part of any Employer that his employees handle unfair goods or go through a picket line after they have elected not to, and such refusal has been approved in writing by the responsible officials of the Southern States Drivers Council, shall be sufficient cause for an immediate strike of all such Employer's operation without any need to go through the grievance procedure herein."

After the picket line at Rayloc was established, the employees of the various Union-employing carriers (parties to the above contract) refused to cross the line to "pick up" Rayloc's goods. Some of the carriers then engaged independent contractors to do the pick-up work, and had the Rayloc freight brought to their (the carriers') shipping platforms for reloading on the trailer trucks for out-of-town delivery. Until March 27 or 28, 1956, the carriers, by and large, experienced only a little difficulty in having their employees load, unload, and otherwise handle the Rayloc freight at or from their (the carrier's) own premises.[5]

[4] The refusal of the carriers' employees to cross the picket line established at Rayloc's plant is not encompassed in the charges or in the allegations of the complaint. Accordingly, the portions of the above-quoted contract provisions purporting to authorize the refusals to cross the picket line are not before us for consideration, and nothing in this opinion shall be taken as passing upon the effect of such provisions.

[5] While employees of the carriers did handle the Rayloc freight in this March 19–27 period, it appears that some at least were "confused" as to whether or not they should do so.

On March 27, 1956, a special Union meeting was held to discuss the question of handling Rayloc freight and the rights of the members with respect to the matter. The details as to the call and conduct of the meeting and the action taken are set forth below.

On March 28, 1956, Union officials sent the following notice to each of the freight carriers who were parties to the area-wide "hot cargo" contract:

> *To all operators:*
>
> DEAR SIR: As you may know, Teamsters' Local 728 is on strike and engaged in picketing Genuine Parts Company's Atlanta area offices and plants, including the Rayloc plant.
>
> In pursuance of their rights under Article IX of the Southeastern Area Over-the-Road Motor Freight Agreement and Article XI of the Local Freight Forwarding Pickup and Delivery Agreement, the members have each made an individual voluntary decision to refuse to handle goods or equipment consigned to or received from this Company. This election has been approved in writing by the responsible officials of the Southern States Drivers' Council.
>
> Under the provisions of the above-mentioned Articles, the Union has the obligation to give you notice of the intent of the members to refuse to handle these unfair goods, and the members have requested that we give you this notice. This letter will serve as such notice.

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since they regarded the Rayloc freight as "hot cargo." Thus, as one employer testified, his employees would sometimes refuse for an hour, or for a day, to handle Rayloc freight, and then would do so when he urged them.

There is also evidence that a number of employees called the Union offices to find out what they should do, and that Union business agents told them at the time that they (the Union agents) would not advise them either way—that they (the members) would have to make up their own minds.

On and after March 28, employees of most of the carriers receiving this notice uniformly refused to handle or to interline Rayloc goods.[6] When asked to handle, each employee almost invariably used the stock reply: "I personally refuse to handle."

No employer discharged any employee for so refusing to handle Rayloc freight. However, there is evidence that some employers attempted, in various ways, to urge their employees to handle the freight; that at least one employer threatened discharge; and that others sought to explore what the employees would do if *supervisory* personnel attempted to service Rayloc goods. In the instances where the employers thus sought to resist their employees' refusals-to-handle, there is evidence that Union officials (conceded to be Union agents) contacted the Employers involved and warned them, in effect, that if they insisted upon their employees' handling Rayloc goods, the Union *could,* under the terms of the contract, and probably *would,* call a total strike against such employers. Certain of these episodes are more fully related below.

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[6] Specific evidence (detailed in part, *infra*) was submitted as to refusal-to-handle episodes involving three freight carriers. In addition, non-specific evidence, indicating that other carriers were affected, was provided by the parties' stipulation that the Union had a "number of witnesses" (230 in all) who, if called, would testify that each was a Union member employed by a carrier [not identified as to name] who was party to the contract, that each such member had refused to handle Rayloc goods on "one or more occasions" after March 27, but that each would assert, if called, that "no officer or agent of the Union had requested, demanded, or asked that they refuse to handle Rayloc goods."

According to Mathis, the Union's secretary-treasurer and business agent, Mathis was advised of "some instances" in which members *did* handle Rayloc goods after March 27. He could not recall what employers were involved in these instances.

Charges were filed by Rayloc on April 5, 1956, complaining of the refusal-to-handle activity by the freight carriers' employees as Union-induced and Union-sponsored secondary boycott action contravening the provisions of Section 8 (b) (4) (A) of the Act. On May 7, 1956, the General Counsel issued a formal complaint in behalf of the Board to obtain a remedy for this activity. In answering the complaint the Union denied that it had taken any measures violative of Section 8 (b) (4) (A) of the Act. It described its activities as including the call of a "special meeting" on March 27, 1956, at which the members individually and unanimously decided not to handle freight destined to or from Rayloc; and its "sole" act in connection with said meeting as the giving of "advice to its members (who were employees of the various motor carriers) of their rights under the [hot cargo] contracts and of the fact that the Union had to notify the companies of the employees' intent, if they so desired, not handle the freight * * *." It further contended, in its answer, that when the employees refused to handle Rayloc freight each was effectuating "an individual choice and decision" and that each employee had a "right" so to do under the "hot cargo" contracts, and that the Union had a "right" to "cause" the members to exercise their contractual privileges.

Litigation of the complaint and answer developed the occurrences of the Union meeting of March 27 in some detail. It appears that Weldon Mathis, the Union official who presided, made known that the object of the meeting was to consider the advisability of the members' support of the Rayloc strike through "hot cargo" action against Rayloc goods being offered to the carriers for transportation. Discussion of the matter, led by Mathis, and participated in by the members present, proceeded on the premise that the

taking of such "hot cargo" action was a desirable means of supporting their fellow members' strike at Rayloc. The only real question which was debated was how to translate the desire into reality in the face of a statutory prohibition against Union-sponsored secondary boycott action, on the one hand, and the possible exercise of the discharge power by carriers against employees who engaged in such boycotting activity on the other. In the course of the discussion, Mathis called the attention of the members to the "protection of rights" clauses in the contracts. He advised them that such contracts offered them a "right" to elect, as "individuals" not to handle Rayloc freight, although the Union could not "instruct" or "require" them to make such an election. He told them further, that under such contracts, the Union had a right as an entity, to call a full-fledged strike to protect a nonhandling "election" by its members, against any discharge action the employers might take; that the Union officials (in whom the administration of Union financial and other affairs was vested) were prepared to, and would, authorize such a strike to protect the members' nonhandling "election"; and that, while a motion approving, in formal terms, a membership pledge not to handle Rayloc goods was unacceptable because it might subject the Union to liability under this Act, a resolution declaring the intent of the members—as individuals—not to handle, could safely be adopted. Mathis then read to the members a resolution he had previously prepared with the advice of counsel, and the membership unanimously adopted it.[7] Thereafter, the members

[7] The Resolution read in full as follows: Local 728 is on strike and engaged in picketing Genuine Parts Company's Atlanta Area Offices and Plants, including the Rayloc plant. Under Article IX of the Southeastern Area Over-the-Road

and their agents—the Union officials—promptly invoked the "rights" which were the subject of the resolution and the discussion, and thus brought about the virtual cessation of business dealings between many, if not all, of the carriers and Rayloc.[8]

In weighing the Union's actions, as above-described, the Trial Examiner deemed himself precluded by the failure of the General Counsel to "attack" the "hot cargo" contracts affirmatively in the complaint, from interpreting any action taken by the Union not inconsistent with the privileges contractually reserved

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Motor Freight Agreement and Article XI of the Local Freight Forwarding Pickup and Delivery Agreement, each member has the right to make an individual voluntary decision as to whether he will or will not handle goods or equipment consigned to or received from this Company.

In accordance with this right each of the members has made and now announce [sic] his individual voluntary decision not to hand [sic] such goods. Under the same Articles mentioned above, it is the obligation of the Union to give each employer notice of the intent of the members to refuse to handle these unfair goods and in order to comply with the obligations of these Articles, the officials of the Union are hereby requested to notify each carrier employer of the intent of these members to refuse to handle these described unfair goods.

[8] Certain additional evidence was also developed as to the activities of various Union stewards at certain of the freight-carriers' premises. In broadly descriptive terms, it establishes that certain Union stewards advised carriers' representatives (their Employers) that the Union had given the members orders or instructions not to handle Rayloc Freight; and that such stewards had otherwise directly induced their fellow members of employees of the carriers not to handle Rayloc freight.

Because the probative value of this evidence turns on a preliminary disposition of the Union's contentions that it is not responsible for the statements or the conduct of job stewards, we shall defer discussion on this phase of the case in the interest of first testing the issues on the basis of the acts of the admitted agents of the Union and its members.

to it and to its members as constituting evidence supporting the complaint.[8] While implicitly conceding that the action of the Union and its members had inspired and had produced a secondary boycott of Rayloc goods by the freight carriers, the Trial Examiner found himself unable to interdict the boycott action so long as there was no "preponderating evidence" that the Union had either directly commanded its members to refuse to handle Rayloc goods or otherwise surrounded any appeals to them for such refusal with any direct or indirect threat of intra-union disciplinary action. He therefore concluded that the refusal-to-handle action could be viewed as action resulting from determinations made by the "individual" workmen free of the compulsion of official Union orders or instructions, and that in such circumstances, the General Counsel had not met his "burden" of proving violations of 8 (b) (4) (A) of the Act. The grounds of our disagreement with these findings and conclusions of the Trial Examiner are indicated below.

2. *Analysis and Discussion*

It is clear from the foregoing facts that, in refusing to handle Rayloc goods and/or otherwise impeding the carriers' handling and transportation of such goods, the employees of the carriers sought to, and in many instances did, force such carriers to boycott Rayloc or to cease doing business with it. That the affected employers were thus placed in an economic position having consequences the Congress deemed injurious to the public interest (as evidenced

[8] The General Counsel confined himself to stating only that the "hot cargo" contracts "and any action they required were not available as a defense" to the complaint.

by the "object" sections of 8 (b) (4)) is not seriously questioned here—nor, we think, can it be. The precise questions framed by the pleadings and the contentions of the parties as they affect the complaint are: (1) does the record establish that such employee activity was "concerted" activity—the product of Union agreement, or the encouragement or inducements of Union agents; and (2) if so, does the existence of the "hot cargo" contracts to which the Union and the carriers were parties operate as a bar to the complaint, and/or otherwise affect the grant of any remedy under it.

Before undertaking the task of answering these questions, we deem it necessary, in light of the Trial Examiner's failure to recognize the difference in the nature of these two issues, and certain observations of our dissenting colleague, to make some preliminary comments upon the separable considerations underlying the stated issues.

Allegations that a union has engaged in, or has induced or encouraged employees to engage in, concerted refusal-to-handle activity, present pure questions of fact. They are susceptible of resolution upon considerations entirely different than those involved in a determination of the merits of union attempts to resort to the provisions of "hot cargo" contracts and the action they require or privilege, as a defense to a complained of violation of Section 8 (b) (4). Thus, the factual allegations must necessarily be resolved wholly on the basis of the record evidence produced in a particular case. Only when they are found to be predicated upon substantial evidence, is the Board squarely faced with the problems posed by the interposition of "hot cargo" contracts as a defense. These latter problems present, essentially, important questions of law calling for the

Board's exercise of the function of statutory interpretation—an area in which the arguments of parties may aid, but cannot limit, the Board's choice of the sources to which it may properly refer in making its determination.

These distinctions between the nature of the two issues as described above have been recognized by the Board even in cases where a majority—in opinions subscribed to by our dissenting colleague—has dismissed complaints it has found factually predicated on union-induced refusal-to-handle activity because of independent determinations that where "hot cargo" contracts existed, the Statute did not authorize the Board to interdict the activity.[10] We are surprised,

[10] *The Pittsburgh Plate Glass* case, 105 NLRB 741, is a notable example of a decisional situation closely analogous to that presented here. There, as here, the complaint allegations that the union had engaged in, and had induced and encouraged employees to engage in, refusal-to-handle activity were predicated largely upon evidence that, in the context of a "hot cargo" contract, Union agents had: (a) "advised" or had otherwise informed members at union meetings and on the job that they (the members) had a "right" as "individuals" to follow their own feelings with respect to the handling of "hot cargo"; and (b) stated to management representatives seeking to resist this conduct that the members' action was consistent with the provisions of the "hot cargo" clauses and represented the members' action, therefore, as an exercise of "rights" the members were entitled to enjoy.

While the Board as then constituted (including Member Murdock) ultimately dismissed the complaint on grounds that the existence of the "hot cargo" contracts operated, as a matter of law, as a defense to the complaint, the Board went out of its way to find that the Union had *in fact* "engaged in and by its instructions and other means, induced and encouraged" the employees of the secondary carrier-employers, to engage in, "a concerted refusal to handle" the freight of a struck-bound shipper. It is interesting to note, that in making these find-

therefore, at our dissenting colleague's suggestion, in this case, that we deny the parties the requirements of "due process" in undertaking to dispose of the issues along the lines indicated.

Having thus made these preliminary observations as to what, in our view, constitutes an appropriate administration of the judicial process in cases such as these, we turn next to a determination of the factual allegations of the complaint.

We are satisfied, upon the facts set forth above, that the refusal-to-handle or "hot cargo" activity of the carriers' employees was an integral part of a program formulated and effectuated by the Respondent Union *as a labor organization,* inspired and sponsored by the *Union officials*—its admitted agents—and directed, as has been noted, at *unlawful objectives.* Thus, we have before us proof that widespread "hot cargo" action followed a Union meeting; that such meeting was called and conducted for the purpose of considering the taking by those members employed by the carriers, of "hot cargo" action; and that such meeting produced an agreement (in the form of a resolution) by the members present, to refrain from handling Rayloc goods. In these circumstances, no straining is required to reach the conclusion that the "hot cargo" action was *concerted* Union action—the means by which a collectively-formulated policy was given effect.[11] We also have before us proof that the

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ings, the Board had before it the contrary determinations on this very issue of fact, of: (a) the District Court passing upon the issues at an injunction phase; and (b) the Trial Examiner passing upon the issues in the record presented to the Board.

[11] Compare *Roane-Anderson Co.*, 82 NLRB 696, 704-705, where the Board (our dissenting colleague agreeing) sustained a Trial Examiner's finding that a "work stoppage in the nature of a strike" was involved when over 100 employees—

Union's officials participated actively in the formulation of this "hot cargo" program by creating the occasion for the members to meet to consider its adoption; by promulgating and sponsoring its adoption; and by pledging the combined economic power and resources of the Union as a means of protecting its members' actual participation in effectuation of the "hot cargo" program against any retaliatory measures the carriers-employers of such members might take. And, finally, we have proof that the Union's officials actually provided the support and "protection" they had thus promised to the members, in each instance in which carriers sought to resist their employees' "hot cargo" actions, by threatening such carriers with a full-scale strike of their operations if they continued their resistance efforts.[12]

We find no substance in the Union's suggestion that the "hot cargo" program involved, basically, the recognition of the right of each individual member to refuse to do work under conditions which did not suit him. The right of an individual to work or not to work as he pleases cannot, of course, be questioned. While we have doubt that exercise of such right also

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members of a union—each individually resigned or quit their jobs on a particular date for allegedly "personal" reasons. The Trial Examiner specifically found "incredible" the contention of the Union and the testimony of employees offered to support it, that such quittings were not the product of "common agreement or direction" but rather the "result of as many different individual decisions arrived at independently, yet fortuitously at the same time."

[12] There is ample precedent for regarding the statements made by union agents to management representatives as probative evidence on the issue of union participation in the members' refusal-to-handle activity. See, e. g., *Pittsburgh Plate Glass Co.*, 105 NLRB 740, 743 at note 3; *Reilly Cartage Co.*, 110 NLRB 1742, 1765, at note 22.

permits an employee to assert a right to elect *not* to perform certain work tasks his employer may properly assign him and yet to continue the employment relationship—this is a question we need not here decide. For, as has already been observed, what is here involved is not an assertion of *individual* right by individuals, but rather the formulation and enforcement by the *Respondent Union—as a labor organization*—and the sponsorship of, and participation in such program by its individual officials, of a collective policy or program aimed at forcing the carriers to deny their transportation facilities to Rayloc.[13]

We can not regard as dispositive here the fact that, in sponsoring the members' adoption of the "hot cargo" program here in issue, the Union imposed no threat of either direct or indirect disciplinary action on its members as a means of obtaining their agreement. This is so because, under the meaning of the words "induce and encourage" in Section 8 (b) (4) (A) which the Supreme Court sanctioned,[14] a union's

[13] Compare, by analogy, *International Typographical Union et al.*, 86 NLRB 951, 953, where the Board (our dissenting colleague agreeing) rejected union contentions that individual rather than union pressure was being exerted on employers under the "condition of employment" strategy. The Board there said, at p. 953, note 4, that the "announcement by a union to employers that its membership would not work under certain conditions, coupled with a union's careful maneuvering of negotiations so as to permit a ready and coincidental exercise of the right not to work having union sanction constitutes a union [sponsored] threat to strike for the specified conditions." The Union's announcement to its membership here and its promulgation of the "right" of individual members to refuse to handle seem analogously related.

[14] *International Brotherhood of Electrical Workers* v. *N. L. R. B.*, 341 U. S. 894.

conduct can come within the reach of the Statute where the union sponsors, authorizes or otherwise encourages, the unlawful activity, even though it may not *compel* or *require* its members to engage in it. The pertinent language of the Supreme Court is as follows:[15]

> * * * The words "induce and encourage" are broad enough to include in them every form of influence and persuasion. There is no legislative history to justify an interpretation that Congress by those terms has limited its proscription of secondary boycotting to cases where the means of inducement or encouragement amount to a "threat of reprisal or force or promise of benefit." Such an interpretation would give more significance to the means used than to the end sought. If such were the case there would have been little need for § 8 (b) (4) defining the proscribed objectives because the use of "restraint and coercion" for any purpose was prohibited in this whole field by § 8 (b) (1) (A) * * *.
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> b, The intended breadth of the words "induce or encourage" in § 8 (b) (4) (A) is emphasized by their contrast with the restricted phrases used in other parts of § 8 (b). For example, the unfair labor practice described in § 8 (b) (1) is one "to restrain or coerce" employees; in § 8 (b) (2) it is to "cause or attempt to cause an employer"; and in § 8 (b) (6) it is to "cause or attempt to cause an employer." The scope of "induce" and especially of "encourage" goes beyond each of them.

We view as irrelevant to a determination of the issues here posed, the asserted "good faith" intent of the Union or its agents to engage in no conduct which the law—as it understood it—squarely pro-

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[15] The quoted portion of the case just cited appears at 341 U. S. 901–902.

hibited. Our examination of the Union's action cannot be controlled by the Union's understanding of the law. For, in the words of the Supreme Court, "the law is its own measure of right and wrong and of what it permits or forbids." *Standard Sanitary Manufacturing Co.* v. *U. S.*, 226 U. S. 20, 49. Further, that the persuasion and influence found to exist may have been but an incident of a "good faith" attempt by Union officials to perform an intra-union duty to "advise" the members, and that it occurred within the confines of a Union meeting, calls for no difference in evaluation of the officials' conduct. The Statute grants no exemptions to unlawful conduct because committed in the confines of a Union meeting or because it occurred as an incident to, or in explanation of, Union regulations or policies.[16]

We conclude, upon the basis of the foregoing, that the Union engaged in, and that its agents induced and encouraged the employees of the carriers to engage in, a concerted refusal to handle Rayloc freight, thus causing the carriers to cease doing business with Rayloc.

We turn now to the problems posed by the existence of the "hot cargo" contract provisions. As noted above, the precise question presented to us by the pleadings in this case is whether such contracts operate as a bar to the grant of any remedy under Section 8 (b) (4) of the Act where we are satisfied upon the record before us, that a secondary boycott was produced by the Union's participation in and its instigation of a concerted refusal by the carriers' employees to handle Rayloc goods. The parties have set forth their position on this issue as follows: Apparently

[16] See, e. g., *Reilly Cartage Co.*, 110 NLRB 1742. Cf. *Joliet Contractors Assn. et al.*, 99 NLRB 1391, enf'd. 202 F. 2d. 606, 611-612 (C. A. 7).

relying upon presently prevailing Board theory, as explicated in the *Sand Door* and *American Iron* cases,[17] the General Counsel did not frame the complaint in terms attacking the contracts as either unlawful or invalid. He claimed only that such contracts, and any action they required were not available as a defense to the kind of refusal-to-handle action described in the complaint, and here found to have been taken. The Union argued, however, that its "hot cargo" contracts must be given operative effect as a defense, so far as its conduct was consistent with the provisions of such contracts, because the contracts are lawful and valid. It rested this argument on what is now familiarly referred to as the *Conway's Express* rule,[18] and on the failure of the General Counsel to "attack" the contracts affirmatively.

In recent years, a Board majority has agreed that "hot cargo" contracts do not remove conduct otherwise unlawful from the reach of 8 (b) (4) (A). But, the opinions subscribed to by such majority have adopted a theory which does not turn on the validity of the "hot cargo" contracts, and assumes that it "is not within the province of the Board" to hold that

[17] *Sand Door and Plywood Co.*, 113 NLRB 1210; *American Iron and Machine Works, Inc.*, 115 NLRB 800.

[18] This rule—followed by our dissenting colleague here and in all cases involving "hot cargo" contracts—affirmatively sanctions the validity of "hot cargo" contracts and gives them operative effect as a defense to the kind of refusal-to-handle activity here involved. It was first enunciated in *Rabouin, d/b/a Conway's Express Co.*, 87 NLRB 972, enforced 195 F. 2d. 206 (C. A. 2) and was followed by the Board until 1954 when the *McAllister Transfer Co., Inc.*, case, 110 NLRB 1769, issued. In the latter case, a majority of the Board held that "hot cargo" contracts cannot operate as a shield to concerted refusal-to-handle actions engaged in by a union, or induced by overt acts of its agents.

such contracts are invalid.[19] The General Counsel's failure to attack the legal validity of the "hot cargo" contracts, and his argument that they did not constitute a defense to the refusal-to-handle activity as here evidenced, follows this theory. However, we are convinced that this is not a case which should be disposed of solely on that narrow theory—as stated in the *Sand Door* case—and that, indeed, we may[20] and should here rule that "hot cargo" contracts between unions and common carriers are invalid and hence cannot be recognized by this Board as having any force and effect so far as the administration of this Act is concerned.[21]

In making this determination, we need not definitively decide that the Union's position that its "hot cargo" contracts constitute a defense to the complaint cannot be disposed of on the narrow theory set forth in the *Sand Door* and the *American Iron and Machine*

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[19] See *Sand Door & Plywood Co.*, 113 NLRB at p. 1215.

[20] In light of the Union's contentions, the members comprising the majority agree that the validity of the "hot cargo" contracts is presented as a basic issue in this case. However, as hereafter indicated, there is some difference of opinion between the members comprising the majority as to whether this basic issue should be decided here.

[21] Although, because of the state of the pleadings, we shall refrain from issuing any order affecting the existing contracts, we may nonetheless utilize this case as an appropriate vehicle for comment on an "evil under the Act which [the Board] sees confronting or lurking in [the] situation before it." *N. L. R. B.* v. *International Brotherhood of Teamsters, etc.*, 225 F. 2d 343, 347 (C. A. 8). As the Court indicated in the cited case in an analogous situation, our ruling at this time should be read as a warning that any attempt to enforce a contract provision like that here involved, after our pronouncement of its invalidity, can afford the basis of unfair labor practice charges. *Ibid.*, at p. 348.

Works cases.[22] But there is room for questioning its adequacy in the factual circumstances of this case, and we find ample basis here for rejecting certain postulations which the Board regarded as unanswerable in the *Sand Door* case and which apparently impelled its holding that, in effect, it was preempted from declaring "hot cargo" contracts invalid or against public policy. We refer particularly to the postulations involved in the Board's reasoning that employers are not required by law to sell their services or goods, as the case may be, to any customer who seeks to purchase them, that "hot cargo" clauses evidence the employer's "voluntary" agreement to refrain, in effect, from doing business when at some future time the union party to such contract requests that he do so, and that, accordingly, the Board is without legal power to view these contracts as a nullity.

Our ten years of experience with the cases involving "hot cargo" clauses, our cumulative examination of the positions taken by the contracting employers in such cases, and the economic realities involved, should leave us with considerable doubt that employers acquiesce to such provisions "voluntarily"—in the pure sense of this term—especially in a heavily organized industry like the motor transportation industry. In any event, if a union cannot, in fact, obtain a valid contract permitting it to take "hot cargo" action, it matters not that the employer's consent to such a contract is given "voluntarily."

The other, and major reason for Board refusal in the cases since *Sand Door* to hold "hot cargo" contracts invalid, postulates, as noted, that if employers may, at will, refrain from doing business with any individual, they may validly agree to refrain from doing

[22] Citations given *supra*, note 16.

business in anticipation of union requests to that end. However, we are convinced that, where the contracting employers are common carriers, the existence of the Interstate Commerce Act,[23] destroys this rationale. For under the express provisions of the ICA, common carriers like those before us here, are not free to decide, at will, to withhold the services they hold themselves out as able to perform, from any customer or class of customers. They are, rather, under a duty to make their facilities available without discrimination or undue preference to *all* customers willing to meet the conditions of their published tariffs and schedules within the physical limits of their facilities.[24]

It is true, as our dissenting colleague points out, that carriers who have been coercively compelled by unions to refuse to service strike-bound plants have succeeded, in some cases, in persuading the ICC not to impose the sanctions of the Act against them for their inability, after making reasonable efforts, to give the complaining shippers service. In each of these cases, performance of the service requested

[23] 49 U. S. C. A., Part II, Sec. 301 et seq. This Act is hereinafter referred to as the ICA. Where the Interstate Commerce Commission is referred to herein, it is identified as the ICC.

[24] See Section 316 of the ICA, and particularly, Section 316 (d) which provides, in part, as follows: It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, that this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

would have required the carriers' employees to go through the picket lines at the struck-bound plant in circumstances imposing serious threats to the safety of the carriers' employees and to its equipment.[25] But we know of no case in which the ICC has held that carriers are free, under the law, to acquiesce, voluntarily, in union requests that goods the union unilaterally brands as "hot" or "unfair" shall, for that reason, be subjected to boycott. Indeed, in the only ICC case we know of in which a carrier refused to service a shipper in circumstances where the shipper did not ask for services which would have required the carriers' employees to go through any *primary* picket-line of a striking union, the ICC would not excuse the carriers' refusal.[26] It is interesting to note

[25] See e. g., *Montgomery Ward & Co.* v. *Consolidated Freightways*, 42 MCC 225. But see *Montgomery Ward Co.* v. *Northern Pacific Terminal Co.*, 128 F. 2d. Supp. 485, in which the U. S. District Court held the common carriers liable to the shipper for refusing freight it had tendered to the carriers even though such refusal was grounded on the fact that the Union (with whom the carrier had a "picket line" contract) threatened to strike the carriers if it carried the goods in question. The Court said: "A contract with a union representing its employees cannot relieve a carrier from performing its duties, even when threatened with a strike."

[26] *Planters Nut & Chocolate Co.* v. *American Transfer Co.*, 31 MCC 719. Cf. *Montgomery Ward, Inc.* v. *Sante Fe Trail Transportation Co.*, 42 MCC 212. The latter case is one in which the ICC would not excuse a carrier's denial of service to a shipper even though such denial was based upon a refusal on the part of the employees of certain motor carriers to cross an established picket line around a complainant's (shippers) establishment. The ICC considered the legitimacy of the picket line, and found that "the picket line does not appear to have been that of a striking union." It further found that it had not been shown that defendant carriers had exercised reasonable diligence to overcome the obstacles imposed, or that they had

that, in so doing, the ICC specifically denied validity to carriers' arguments that they, as corporations, could not be held to have refused their services to the shipper, because it was their *employees'* refusal to handle the goods their union had branded as "unfair" which was the proximate cause of the resulting boycott.

In any event, it is not our intent, in making reference to the provisions of the ICA to judge the actions of the common carriers subject to the ICA. Our purpose is narrowly limited and can be summarized as follows: We have been commissioned by the Supreme Court not to ignore the other and equally important

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made a reasonable attempt to serve the complainant and were physically prevented from so doing.

It is interesting to note that, in a recent case coming before the ICC an Examiner ruled that motor freight carriers who boycotted goods of a shipper branded as unfair by a union (beneficiary of a "hot cargo" contract signed by the carrier) violated the provisions of the Interstate Commerce Act. *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc., et al.*, Case No. MCC-1922 on the ICC dockets. Compare, by analogy, *U. S.* v. *Balt. & O. R. R. Co.*, 333 U. S. 169, where the Court held that a railroad had violated the ICA by refusing to carry certain goods of a shipper because the provisions of a lease contract between the railroad and the owner of the track forbade the railroad from carrying the kind of goods the shipper sought to ship. The Court there said: (at p. 175) The ICA is aimed at wiping out discriminations of all types and language of the broadest scope has been used to accomplish the purposes of the Act * * *. This Court has long recognized that the purpose of Congress to prevent certain types of discriminations and prejudicial practices could not be frustrated by contracts * * *. Cf. *Nebraska Short Line Carriers, Inc.*, Case No. MC-116067 (Sub-No. 2) D. L. R. 8-9-57 (Recommended Order of Examiner of ICC).

statutory schemes in administering our statute.[27] The carriers before us are subject to the ICA—a scheme designed, like ours, to facilitate the flow of commerce. It has been argued that a Board holding that the "hot cargo" contracts are invalid may impose a qualification upon an employer's right to choose his customers.[28] We have looked to the provisions of the ICA to determine whether such argument is here available. Because the ICA in itself restricts and qualifies the common carriers' freedom of choice in the respects noted, we find that the argument as above-stated is destroyed, and that, accordingly, the rationale of those Board cases which sustain the validity of "hot cargo" contracts is wholly inapplicable where the Employer parties are common carriers subject to the provisions of the ICA. Whether or not such rationale may still be effectively employed in cases involving other types of employers is a question we need not here decide.

We are satisfied, on the basis of the legislative history of the Act as it throws light on the objectives of the Congressional scheme embodied in Section 8 (b)

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[27] See *Southern S. S. Co. v. N. L. R. B.*, 316 U. S. 31, 47, where the Supreme Court stated: "The Board has not been commissioned to effectuate the policies of the NLRA so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodations of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

[28] The right to condition such choice, by contract, would be an incident of the larger right to make the choice.

(4) of the Act,[29] that the "hot cargo" contracts here involved are repugnant to the basic policies of the Act and in conflict with the public rights this Board is under a duty to protect. We therefore hold that, at least where common carriers for hire are involved, the kind of "hot cargo" clauses here before us are invalid at their inception and can be given no operative cognizance so far as the administration of this Act is concerned.[30]

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[29] See the various opinions signed by our colleague, Member Rodgers, (including his concurrence in the instant case) which ably review and refer to the pertinent legislative history of the Act and of the legislative debate which preceded its enactment. See particularly the *McAllister Transfer Co.*, opinion, 110 NLRB 1769, 1778–1783. Such references support the view that, in enacting Section 8 (b) (4) (A), Congress not only intended to outlaw *all* union-sponsored secondary boycotts instituted under "hot cargo" and "struck work" contracts, but evidenced an intent to nullify and to invalidate such contracts. In the latter connection, see particularly the reference at 110 NLRB p. 1781 and note 20. See also, the dissenting opinion of Member Reynolds in *Rabouin, d/b/a Conway's Express*, 87 NLRB 972, at pp. 995–996 for a general discussion of the legislative intent.

[30] It is the view of Chairman Leedom and Member Jenkins that the manner in which the Union here employed its invalid "hot cargo" contracts in producing a secondary boycott aptly demonstrates the need for an affirmative decisional rule which will serve notice upon unions that their act of integrating into a collective bargaining contract provisions which authorize and encourage employees to refuse to handle freight or goods described therein as "hot" or "unfair" constitutes *prima facie* evidence of union inducement or encouragement of the kind of activity interdicted by Section 8 (b) (4). The pragmatic approach that has heretofore been utilized by the Board in dealing with "hot cargo" contracts does not discourage unions from demanding such contracts at the bargaining table. It is for this reason that we would propose a rule, wherever (as is here the case) we would find "hot cargo" contracts to be invalid, clearly notifying unions and their members that they cannot, as a matter of law, enjoy, exercise, or assert any of the "hot

In stating these views, we are not unmindful of those arguments opposing them which are predicated upon a restrictive interpretation of the words "in the course of employment" as used in the introductory phrases of Section 8 (b) (4). Nor are we unmindful of the fact that the Second Circuit Court of Appeals deems those arguments meritorious.[31] But, with due

cargo" privileges such contracts purport to grant and that any attempt so to do for the purposes sought to be served by such contracts exposes the unions to liability under Section 8 (b) (4). Specifically, we would declare that, in situations like those before us here, a *prima facie* case of a union violation of Section 8 (b) (4) is established whenever proof is adduced that: (1) there is in effect a collective bargaining contract which purports to authorize or encourage employees of a common motor carrier for hire to exercise a "right" not to handle a shipper's goods because such contract brands such goods as "unfair" or "hot"; and (2) such shipper is in fact refused the use of the facilities of said common motor carrier for hire. Cf. *Joliet Contractors Association* v. *N. L. R. B.*, 202 F. 2d 606, 608–609 (C. A. 7), where the Court indicated that the provisions of internal union regulations and by-laws which purported to preclude union members from working on materials supplied by nonunion or unfair firms supplied proof of inducement and encouragement of employees to strike or to engage in conduct in the nature of a strike, once an employer-employee relationship has been established.

[31] See *Milk Drivers, et al.* v. *N. L. R. B.*, 245 F. 2d 817, (C. A. 2), affirming the views originally expressed in *Rabouin, d/b/a* Conway's Express, 195 F. 2d 906 (C. A. 2), and in the Board majority in its decision of the latter case, 87 NLRB 972. *But see* the concurring opinion of Judge Lumbard in *Douds* v. *Milk Drivers and Dairy Employees Union Local 584 International Brotherhood of Teamsters, et al.*, (C. A. 2), 40 LRRM 2673, decided October 2, 1957, in which he comments: "* * * the decisions of this Court in the *Rabouin* and *Milk Drivers* [cases] seem to me to be contrary to both plain statutory language and the intent of Congress." Our dissenting colleague's opinion is predicated on the rationale of the decisions of the Second Circuit Court of Appeals cited in the first sentence above.

deference to that Court, we respectfully disagree with its interpretation of the quoted statutory phrase. For we are convinced of the correctness of the view—initially given expression by the majority opinion of the Board in *Sand Door*, and since approved by the Ninth and Sixth Circuit Courts of Appeals[32]—that the words "in the course of employment" were employed to distinguish between employee conduct or activity in the course of the employment relationship and in furtherance of the employer's business, and employee conduct in the pursuit of interests not related immediately to the requirements of the business of the employer-party to the employment relationship. In sum, we feel that the phrase "in the course of employment" was used by Congress to make clear its recognition that unions traditionally induce employees, in their capacity as consumers, to refrain from purchasing or using certain products made by nonunion manufacturers or produced under sub-standard working

[32] See the *Sand Door* decision, op. cit., *supra*, note 16, at p. 1217. The Ninth Circuit Court of Appeals approved this view of the Statute. See 241 F. 2d. 247. The Sixth Circuit Court of Appeals affirmed it in enforcing the Board decision in *United Brotherhood of Carpenters & Joiners*, v. *N. L. R. B.*, 242 F. 2d 932. To the same effect see the dissenting opinion of Judge Prettyman, in *General Drivers, et al.*, v. *N. L. R. B.*, 247 F. 2d 71 (C. A. D. C.) in which he expresses approval of the Board's interpretation of the statutory language here under discussion and the grounds of his disagreement with his colleague's rejection of that interpretation and their adoption of the restrictive meaning given the terms by the Second Circuit Court of Appeals.

The concurring opinion of Member Rodgers quotes pertinent passages from the opinions of the Sixth Circuit Court of Appeals and the dissent of Judge Prettyman from the decision of the Court of Appeals for the District of Columbia. We join Mr. Rodgers in expressing our agreement with these quoted passages and the conclusions they support.

conditions, and to exempt that kind of union inducement from the operative scope of Section 8 (b) (4).[33] We are entitled so to reason because of evidence in the legislative history that, although Congress knew that union-inspired secondary boycotts frequently occurred in the context of "hot cargo" contract arrangements, it nonetheless employed no language which would exempt such boycotts from the purview of Section 8 (b) (4), but chose, rather, to interdict all union-inspired boycott action without qualification.[34] But, in addition, we may and have considered the meaning given simlar phraseology by the Courts in interpreting those statutes containing it which predated the enactment of this Act, together with the fact that nothing in the legislative history justifies imputing to the legislature any intent to use those words in any different sense in framing this Act. We refer specifically to the fact that the words "in the course of employment" appeared most frequently in statutes relating to workmen's compensation. References to standard texts explaining the meaning of these terms in workmen's compensation cases establishes that their meaning in this usual context was well understood to have reference to the *time*, *place* and *fact* of employment, and imposed employer liability for injuries sustained while employment was "in progress" and while

[33] It seems obvious to us in a situation like that here before us, the Employer's business clearly contemplates the handling by employees, at his direction, of goods of other employers. For such "handling" requirement is part of the employment relation before a boycott is instituted and will still be part of the relation after the boycott is ended: and the very argument that a "hot cargo" clause removes the "handling" duty from "the course of employment" is a recognition that the "handling" of goods was meant to be regarded as being part of the "course of employment" as offered and accepted.

[34] See *supra*, note 29 for the pertinent references.

employees were engaged in activity which, fairly viewed, was in furtherance of, and for the benefit of, the employer's business as he envisaged it.[35]

As has been indicated, our power to frame a remedy giving full substance to these views is limited by the pleadings. Nevertheless, what we have said preempts the Union from justifying either its representation of the "hot cargo" contracts to its members as affording them protected rights, or its officials' active promulgation and support of its members' "hot cargo" action, on grounds that such conduct was expressly authorized by, and was consistent with, the terms of the "hot cargo" contract clauses.

We conclude on the basis of the above rationale that the "hot cargo" contracts here involved were wholly invalid and that, as a matter of law, their provisions afforded the Respondent Union no basis for defending the charged violations of Section 8 (b) (4) (A) of the Act.

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[35] The following quotations from standard texts provide an example:

(a) "'In the course of employment' points to the time, place and circumstances under which an accident takes place, and simply means 'while the employment was in progress'." W. R. Schneider, *Workmen's Compensation Text*, Vol. 6, p. 19.

(b) "An injury is said to arise in the course of employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while he is fulfilling his duties or engaged in doing something incidental thereto." A. Larson, *The Law of Workmen's Compensation*, Vol. 1, p. 193.

See also the interpretation of the phrase "in the course of employment" in *Voehl v. Indemnity Insurance Co.*, 288 U. S. 162, where the *Longshoremen and Harbor Workers Compensation Act*, U. S. C. A., Title 3, Sections 901–950 was being interpreted. See also the construction of the same language by the Court of Appeals for the District of Columbia in *Lumberman's Mutual Casualty Co. v. Hoage*, 58 F. 2d 1072.

3. Discussion of the special issues and facts relating to the activities and statements of job stewards

The General Counsel claimed that, as to the refusal-to-handle episodes involving certain of the carriers, the statements and activities of Union job stewards at the premises of such carriers provided an additional and/or independent basis for sustaining the complained of violations.

The record evidence going to the nature of the stewards' activities and statements is set forth in the Intermediate Report. In dealing with such evidence, the Trial Examiner proceeded on the basic premise that job stewards were not "agents" of the Union and that hence, none of the conduct or the statements variously attributed to some of the stewards could properly be used as evidence of the Union's inducement or encouragement of the refusal-to-handle action.

In his exceptions, the General Counsel claims, among other things, that the Trial Examiner erroneously applied the principles established in *Southwestern Motor Transport Co.*, 115 NLRB 981. He contends that, in fact, such case constitutes precedent for findings that: (1) the Union is responsible for acts of stewards which amounted to inducement or encouragement of employees, whether or not the same were expressly authorized; and (2) statements attributed to stewards by management representatives to the effect that the Union had instructed, directed or authorized refusals-to-handle, constitute direct evidence bearing on the truth of the subject-matter of the statement, because such stewards' statements concerned a matter within the scope of their authority. We agree with both aspects of the General Counsel's substantive contentions. We also find meritorious his

reliance upon *Southwestern Motor Transport* case as supporting precedent for such contentions and ground our findings here upon that and the related decisions hereafter cited.

The record here, as in other analogous cases in which the Board has passed upon the status of union job stewards, establishes that the Union's job stewards have the customary duties and authorities of union job stewards, including the transmission of official union messages and instructions to the members.[36] While the Union's officials claimed that the authorization vested in stewards with respect to the transmission of messages to members is limited to messages which such officials give the stewards in *writing*, we do not regard such asserted limitation as having any real significance to the determination of the agency issues as here posed. What is controlling is that, so far as all the parties dealing with Union stewards are involved, the stewards were *the Union* on the job and that they were expressly vested with sufficient authority so to act, as to warrant the inference that the actions here attributed to them fell within the scope of the delegated powers. We note, among other things, that there is nothing in the by-laws or in any other integrated Union document to show any such stringent limitation on stewards' duties as those here

[36] The Union's officials who testified with respect to the duties performed by stewards on behalf of the Union described them as including dues-collections, checks of membership books, making reports on employment of nonmembers to the union, posting official Union communications and notices on the Company's bulletin boards, accepting employee grievances and functioning as the Union agent in the first step of adjustment of such grievances with management, reporting on the grievances to Union officials, and transmitting to employees the written instructions or messages the Union has sent to stewards for distribution to the membership.

claimed by the Union. We note, further, that there is no evidence that any employee-members had been specifically advised to disregard oral instructions or directions given them by stewards in the capacity of the latter as Union job-representatives; that, indeed, there is some record evidence that employee-members believed that stewards had the power to instruct them—as Union agents—as to whether or not to handle Rayloc goods, and in the presence of stewards, offered to handle if the stewards so instructed; and that, in any event, the stewards' activities, fairly viewed, implemented the general policies the Union had officially approved and sponsored.

We next decide what statements and activities attributed to Union stewards supply support for the complaint within the framework of the principles set forth above. We regard it sufficient, for our purposes, to utilize: (1) only so much of the testimony of management representatives with respect to the stewards as was specifically credited by the Trial Examiner; and (2) testimonial admissions by stewards of certain conduct we deem to be violative of Section 8 (b) (4) (A) of the Act.

Credited management testimony established that, at the Simpson Express Company, Steward Woodbury: (1) told Simpson (the owner) in the presence of other employees, and in response to Simpson's request that Woodbury ask the men to handle the Rayloc freight, that he could not do so; (2) told Simpson and Ryan (the dock foreman), in the presence of other employees and in response to Simpson's question as to what would happen if management agents handled the goods, that "the boys would probably walk off the job"; (3) remained silent when Fulcher, one of the employees, told Simpson, when the latter asked Fulcher to handle the freight that he

(Fulcher) could not do so "if the steward told him not to handle it"; and (4) represented to Simpson, in effect, that the Union's Business Agent would not allow the members to handle or interline the Rayloc freight. Testimonial admissions made on the record by Jimmie Butler, the steward at the Aker's Express Company, established *inter alia*, that: (1) on one occasion, prior to the March 28 membership meeting, Butler told the employees he would file "grievances" against them in the event they handled "scab freight"; and (2) that, on another occasion, after the said meeting, he told "the boys" that "they didn't have to handle the freight" and that if the Company tried to make the employees do so, he could "file grievances" against the Company. We hold that this evidence constitutes direct evidence—in addition to that relating to the conduct of Union officials—establishing that, in violation of Section 8 (b) (4) (A), the Union induced and encouraged employees of Simpson Express and of Aker's Terminal Company to engage in a concerted refusal to handle Rayloc goods.[37]

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[37] In addition to the *Southwestern Motor Transport* case, cited *supra*, we refer to the following cases as supporting the findings and conclusions here reached. *Reilly Cartage Co.*, 110 NLRB 1742, 1745, 1746, note 20; *American Iron and Machine Works*, 115 NLRB 800, 817; *Capital Paper Co.*, 117 NLRB No. 95, adopting pp. 8–9 of the Trial Examiner's report. See also *Roane-Anderson Co.*, 82 NLRB 696, 712–713; *General Millwork Co.*, 113 NLRB 1084, enforced 39 LRRM 2731, 2733 (C. A. 6).

Compare, the Board's holdings that statements made, and acts committed by, supervisors are binding on employers even though the supervisors were not expressly authorized to take the actions, or to make the statements upon which the Board predicated the violation findings. See, e. g., *Drico Industrial Corp.*, 115 NLRB 931; *Hardware Engineering Co.*, 117 NLRB No. 134.

THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of the Respondent Union, set forth above, occurring in connection with the operation of Genuine Parts Company and the freight carriers in and around the Atlanta, Georgia, area, who employ members of the Respondent Union, have a close, intimate and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that the Respondent Union violated Section 8 (b) (4) (A) of the Act, as set forth above, we shall order it to cease and desist from such conduct. We shall also order it to take certain affirmative action designed to effectuate the policies of the Act. Because of the extensive scope and range of the Respondent's unlawful activities here, we find it necessary, in order to effectuate the policies of the Act, to issue an order broad enough to enjoin the recurrence, throughout the Atlanta, Georgia, area, of the conduct found unlawful in this case. Further, we find it appropriate to incorporate in our order, a provision that the Respondent Union publish a copy of the notice attached to this Decision and Order as the Appendix, in an Atlanta, Georgia, newspaper, of general circulation.[38]

CONCLUSION OF LAW

1. Truck Drivers and Helpers Local Union No. 728, International Brotherhood of Teamsters, Chauf-

[38] See *Capital Paper Co.*, 117 NLRB No. 95, and other cases there cited, where similar requirements have been made in Board orders.

feurs, Warehousemen and Helpers of America, AFL–CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By engaging in, and by inducing and encouraging employees of Simpson Trucking Co., Akers Terminal Co. and of other freight carrier employers in the Atlanta, Georgia, area, employing members of the Respondent Union, to engage in a strike or concerted refusal in the course of their employment to handle freight brought to docks of their respective employers from or by Genuine Parts Company, Atlanta, Georgia, where an object thereof was to force or require such employers to cease doing business with Genuine Parts Company, the Respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

ORDER

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent Union, and its officials and agents, shall:

1. Cease and desist from engaging in, or from inducing and encouraging employees of Simpson Trucking Co. and of Akers Terminal Co. and of any other freight carrier employers in the Atlanta, Georgia, area, employing members of the Respondent Union, to engage in, a strike or concerted refusal in the course of their employment to process, transport, or otherwise handle or work on goods, articles, or commodities or to perform services for their respective employers, where an object thereof is to force or re-

quire any such employer to cease doing business with Genuine Parts Company or with any other like person or company who has business relations with aforementioned freight carriers in the Atlanta area.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

a. Post at its business offices at Atlanta, Georgia, and at all other places where notices to its members are customarily posted, copies of the notice marked "Appendix."[39] Copies of said notice, to be furnished by the Regional Director for the Tenth Region, shall, after being duly signed by an official representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and be maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members of the Respondent Union are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

b. Cause a copy of said notice to be printed, at the Respondent Union's expense, in a daily newspaper of general circulation in Atlanta, Georgia.

c. Mail to the Regional Director for the Tenth Region signed copies of said notice for posting at the premises of Genuine Parts Company, Simpson Express Co., Akers Terminal Company, and of other freight carriers employing members of the Respond-

[39] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

ent Union, if willing, in places where notices to their employees are customarily posted.

d. Notify the Regional Director for the Tenth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent Union has taken to comply herewith.

Dated, Washington, D. C.

[SEAL] BOYD LEEDOM, *Chairman.*
JOSEPH ALTON JENKINS, *Member.*
NATIONAL LABOR RELATIONS BOARD

PHILIP RAY RODGERS, Member, concurring:

I agree with my colleagues of the majority that the Respondent Union violated Section 8 (b) (4) (A) of the Act. I deem it essential, however, to express my views separately because of certain basic considerations which govern my reasons for reaching this result.

The basic issue in this case arises out of the existence of so-called "hot cargo" clauses in the contracts between the carriers and the Respondent Union and the treatment to be accorded such clauses when they are pleaded as a defense to a complaint alleging a violation of Section 8 (b) (4) (A) of the Act. Without considering the implications of the Interstate Commerce Act, as two members of the majority have done,[40] as I read the National Labor Relations Act and the legislative history that attended the enactment of the secondary boycott provisions, I find no need for going beyond the confines of our own Act

[40] To the extent that the majority opinion holds that "hot cargo" agreements cannot be pleaded as a defense to a complaint alleging a violation of Section 8 (b) (4) (A), I concur therein. See my opinion in *McAllister Transfer*, 110 NLRB 1769, and my concurring opinion in *Sand Door and Plywood*, 113 NLRB 1210.

for holding that "hot cargo" agreements cannot be pleaded as a defense in cases of this type. A basic principle that underlies the Act we are charged with administering is that the parties may not waive rights vouchsafed by the Act. The reason for this is clear. Rights accorded by the statute stem from an overriding consideration clearly expressed in the Act itself "to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." [41]

In Senate Report No. 105 on S. 1126, the Committee made it clear that the provisions dealing with secondary boycotts were incorporated in the bill "in order adequately to protect the public welfare which is inextricably involved in labor disputes" and that the Board was to act "in the public interest and not in vindication of purely private rights" in pursuing the remedies created by Congress.[42] Indeed, the exclusive grant of authority to the Board to prevent and remedy unfair labor practices affecting commerce [43] was to insure that the existence of private agreements at odds with the statute would not preclude the Board from acting in the public interest.[44] This is wholly consistent with the rule in other areas of the law that private agreements are invalid if they contravene the public interest.[45] It is well established that the statutory protection of the public interest

[41] Section 1 (b) of the National Labor Relations Act.

[42] Senate Report No. 105, p. 8 (1 Leg. Hist. 414).

[43] Section 10 (a) of the National Labor Relations Act.

[44] *Amalgamated Utility Workers* v. *Edison Company*, 309 U. S. 261, 264, 267, 269; *N. L. R. B.* v. *General Motors Corp.*, 116 F. 2d 306 (C. A. 7).

[45] See, for example, *Steele* v. *Louisville Railway Co.*, 323 U. S. 192.

cannot be waived by the agreement of private parties.[46]

Turning to the precise issue under consideration, we are confronted with a statutory proscription of secondary boycotts and an attempt by the Respondent Union to escape that statutory ban by pleading a private agreement. Stated succinctly, we are called upon to decide whether, even though all the elements necessary to establish a violation of Section 8 (b) (4) (A) of the Act are present, a private contract, designed to authorize that which the statute prohibits, can constitute a defense to a complaint alleging such a violation.

As I view it, this situation is essentially analogous to one where an employer and a union conclude an agreement obligating the union to withdraw unfair labor practice charges and to refrain from filing new ones. Clearly, in that case the Board is not prevented by the agreement of the parties from processing charges filed by the union, although such filing was in direct contravention of the terms of the agreement.[47] In those circumstances, the invalidity of the agreement is predicated not on the theory that its execution is in itself an unfair labor practice, but on the theory that the agreement is in derogation of the public policy expressed in the Act. The same rule must perforce be applied in the case of so-called "hot cargo" agreements, for, to permit a union, intent on illegal secondary activity, to secure by private contract what amounts to a personal, private exemption from certain sections of the law is to subsidize circumvention and penalize compliance. Such a course

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[46] 12 Am. Jur. Sec. 166; *Bowersock* v. *Smith*, 243 U. S. 29; *Grandview Inland Fruit Co.* v. *Hartford Fire Insurance Co.*, 109 A. L. R. 1472; *Short* v. *Bullion Beck Co.*, 45 A. L. R. 603.

[47] *N. L. R. B.* v. *General Motors Corp.*, *supra*.

must inevitably lead to the collapse of all reasoned regulation and a return to the "law of the jungle" in labor relations—a law which both the Wagner Act and the Taft-Hartley Act found to be incompatible with a Twentieth Century civilization.

Mindful of these considerations, I cannot subscribe to the view that a "hot cargo" agreement is a valid contract. In my opinion, a "hot cargo" agreement is invalid at its inception. In legal contemplation it is therefore unenforceable. Its intrinsic invalidity stems from its very purpose—the negation of public policy. Those who reason that such agreements are valid base their conclusion in large part on the premise that the "hot cargo" clause has the effect of removing so-called "hot cargo" from the course of the employment of the employees involved, and that therefore conduct which would concededly be violative of the Act in any other circumstance is rendered harmless, because under a "hot cargo" clause such conduct would not occur in the course of the employment of the employees concerned. The weakness of that reasoning is that it claims too much for the phrase and too little for the sentence.

The Sixth Circuit in *Local 11, United Brotherhood of Carpenters & Joiners, et al.* v. *N. L. R. B.*, 342 F. 2d 932, treated this question in some detail. In that case, the Respondent Union's position was that if an employer has agreed in advance that a certain product need not be used by his employees, and he subsequently honors this agreement by acquiescing in the employees' unwillingness to use or work on the product, there can be no "concerted refusal" by the employees "in the course of their employment" to use or work on the product. Similarly, it was argued that their conduct cannot be "in the course of their employment" because the employer has agreed in advance

that their employment would not include working on that product. In effect, argued the union, an employer cannot be "forced or required" to cease handling goods which he had already agreed not to handle. The Court summarized this position as follows:

> These semantic contentions are buttressed by the argument that the primary purpose of Section 8 (b) (4) (A) of the Act is to protect neutral employers from strikes resulting from their desire to use goods produced by another employer engaged in a labor dispute, and that an employer who has agreed in advance not to use such goods needs no such protection.

The Court disagreed sharply with such reasoning. It stated:

> ** * * the primary purpose of Congress in enacting Section 8 (b) (4) (A) was to protect the public interest from strikes or concerted refusals interrupting the flow of commerce at points removed from the primary labor-management dispute. To allow the acquiescence of a single employer to validate conduct contrary to the express language of the statute would be to frustrate this Congressional purpose. And, as pointed out by the Board, the phrase 'in the course of their employment' does not have the restricted meaning originally assigned to it, but rather, Congress 'used this phrase only to distinguish between employees in their capacity of employees and employees in their capacity of consumers.'*[48] (Emphasis added.)

In another case,[49] Judge Prettyman, in commenting on this argument, stated:

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[48] See *Sand Door & Plywood Co.*, 113 NLRB 1240, enf'd 241 F. 2d 147 (C. A. 9).

[49] *General Drivers, et al.* v. *N. L. R. B.*, 247 F. 2d 71 (C. A. D. C.).

I do not agree with the argument that the hot cargo clause has the effect of removing struck goods from "the course of their [the Teamsters'] employment." If such a construction could be placed upon the phrase in Section 8 (b) (4) (A), careful contract draftsmanship could legalize without qualification any otherwise prohibited activity, e. g., the jurisdictional strike, the sympathy strike, and the wildcat strike, by artificially exempting the work involved from the course of the employment governed by the contract. I think the statute cannot thus be nullified.

I concur in the analysis of the Sixth Circuit and the Comment of Judge Prettyman.[50]

As I stated in *McAllister Transfer*, if the structure of the Act is examined, one cannot help but reach the conclusion that if Congress had intended to legalize "hot cargo" clauses, it would have done that by way of a specific exception to the general secondary boycott provisions. This was precisely what Congress did in enacting unfair labor practice provisions in Section 8 (a) (3) of the Act; it specifically provided that contracts conforming to the permissible limits of union security shall be valid. But both the plain language

[50] In this connection, I respectfully disagree with the treatment accorded the phrase "in the course of their employment" by the Second Circuit in its opinion in *Milk Drivers, et al.* v. *N. L. R. B.*, 245 F. 2d 847 (C. A. 2). But see *Douds* v. *Milk Drivers and Dairy Employees Union, Local 584, International Brotherhood of Teamsters, et al.*, (C. A. 2), 40 LRRM 2673, decided October 2, 1957, subsequent to the *Milk Drivers* case. There the Second Circuit affirmed an injunction granted pursuant to Section 10 (1) of the Act against secondary picketing in a case where the Union sought to implement a "hot cargo" clause. Significantly, Judge Lumbard in concurring in the *Douds* case declared that "the decisions of this Court in the *Rabouin* and *Milk Drivers* [cases] seem to me to be contrary to both plain statutory language and the intent of Congress."

of the statute, and the clear background of opposition to secondary boycotts in general and "hot cargo" clauses in particular,[51] make it apparent that Congress had not the remotest intention of carving out an exception in favor of "hot cargo" clauses. Certainly, it did not do so by the use of the words "in the course of their employment."

In this connection, it should be borne in mind that Board policy at the time the amendments to the Act were considered was unalterably opposed to the effectuation of contracts that contravened the objectives of the Act, and that this policy was consistently approved by the courts of the land, including the United States Supreme Court.[52]

For example, in *J. I. Case Co.* v. *N. L. R. B.*, *supra*, at p. 337, the United States Supreme Court stated:

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective bargaining agreement. "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices." *National Licorice Co. v. Labor Board*, 309 U. S. 350, 364. *Wherever private contracts conflict with its functions, they obviously must yield or the Act*

[51] 92 Cong. Rec. 5065 (2 Leg. Hist. 1380).

[52] *J. I. Case* v. *N. L. R. B.*, 321 U. S. 332; *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350; *N. L. R. B.* v. *Winona Textile Mills*, 160 F. 2d 301 (C. A. 8); *N. L. R. B.* v. *Reed & Prince Manufacturing Co.*, 118 F. 2d 874 (C. A. 1); *Hartsell Mills Co.* v. *N. L. R. B.*, 111 F. 2d 291 (C. A. 4).

would be reduced to a futility. (Emphasis added.)

Congress, at the time of these enactments, was well aware of this policy, and for that reason it was not called upon to state in the text of the Act that which was already well-established law, namely, that the terms of a private agreement which attempt to evade the proscriptions of the Act shall not constitute a defense to conduct clearly outlawed by the Act.

The violence that "hot cargo" agreements do to the statutory scheme is by no means confined to the secondary boycott provisions of the statute, nor is it confined to the relationships between the individuals signatory to such agreements. These agreements are designed to, and have the effect of, emasculating and undermining other basic precepts of the statute as well. For example, in the *McAllister* case, such clause was invoked against an employer and his cargo became "hot" only after his employees had unanimously rejected the union concerned by means of an election conducted by this Board. In the *Sand Door* case, such clause was invoked against an employer and his goods became "hot" only because his employees were represented by a union other than the union invoking the "hot cargo" clause. Many similar cases can be cited. Thus, if these clauses are allowed to stand, they will have the effect of inviting and compelling the wholesale commission of unfair labor practices by employers throughout the country, and the attendant effect of depriving countless employees of basic rights proclaimed to be protected by this Act.

Presumably, if these clauses are upheld, any employer's product could be labeled "hot cargo" by the union, if that employer refused (a) to recognize a minority union, (b) to displace an established union,

(c) to compel his employees to join a union against their will, or (d) to become a signatory to a "hot cargo" agreement. Presumably, also, a strike on the part of a union to compel employers to sign such agreements would also be legal and, therefore, a protected activity. The violence this would do to the entire framework of the statute is patent.

The widespread use of such agreements would serve to exempt from this section of the Act, the two segments of American industry which Congress felt, in this respect, stood in greatest need of its protection, if the public interest were to be served; namely, the transportation and building and construction industries.

In concluding that a violation of Section 8 (b) (4) (A) occurred in this case, I am, of course, relying on the factual findings of inducement and encouragement of employees of secondary employers and the proscribed objective. I am in no sense including the existence of the "hot cargo" agreement as an element of that violation. I am simply saying that, when all of the elements of a violation are present, a "hot cargo" clause cannot be pleaded as a defense, because such agreements are in derogation of the public policy expressed in the Act and cannot, therefore, serve to immunize and condone unlawful conduct. As I see it, this is the only result that is consistent with sound statutory construction.

As I am satisfied that Section 8 (b) (4) (A) has been violated by the Respondent Union for the reasons stated above, I join in the ultimate findings of the majority.

Dated, Washington, D. C.

PHILIP RAY RODGERS, *Member.*
NATIONAL LABOR RELATIONS BOARD

STEPHEN S. BEAN, Member, concurring:

I agree with the other members of the majority in this case in finding, upon the facts which have been set forth describing the conduct of the Union's officials, that the Respondent Union violated Section 8 (b) (4) (A) of the Act. However, my concurrence in their view that the "hot cargo" provisions of the contracts here involved constitute no defense to the complaint, is predicated solely on the theory set forth by the Board's majority in the *Sand Door*[53] case. As do my colleagues, I recognize the obligation resting upon this Board, in effectuating the Congressional intent, to give heed to the necessity which often exists for "careful accommodation of one statutory scheme to another,"[54] and not to pursue the purposes and policies of the Labor Relations Act with such single-minded devotion as to be blind to the Congressional objectives embodied in other enactments. Indeed, only recently, I have joined in a decision wherein the Board held that, in a situation where this Board and another Federal agency were both required to interpret the same statutory provision;[55] considerations of comity between Governmental agencies dictate that the views of the agency primarily concerned with administration of the statute in question should be followed as the guide to its interpretation. The cases cited by my majority colleagues do not, however,

[53] *Sand Door and Plywood Co.*, 113 NLRB 1210.

[54] *Southern Steamship Company* v. *N. L. R. B.*, 316 U. S. 31.

[55] *Olaa Sugar Company, Limited*, 118 NLRB No. 195, wherein the issue concerned the definition of agriculture appearing in the Fair Labor Standards Act which this Board has been required, by rider to its own appropriations act, to follow in interpreting the exclusion of "agricultural laborer" from the definition of "employee" in the Labor-Management Relations Act. See also *Imperial Garden Growers*, 91 NLRB 1034.

appear to me to demonstrate that the ICC has yet spoken with finality concerning the validity, under the statute which it administers, of a "hot cargo" contractual provision. And I find nothing in the existing Board doctrine as set forth in the *Sand Door* case which would seem to impinge either upon the interpretation attributed by my colleagues to the provisions of the ICA or might seem likely to impinge upon any such interpretation which the agency charged with administration of that statute may yet adopt. If later events should prove that I am wrong, I feel sure that there will be opportunity for this Board to make any necessary accommodation of its doctrine to the policies of the ICA. For these reasons, I find it unnecessary to rely upon any other or further principles than those set forth in the Board's *Sand Door* decision for the determination of this case.[56]

Dated, Washington, D. C.

STEPHEN S. BEAN, *Member.*
NATIONAL LABOR RELATIONS BOARD

ABE MURDOCK, Member, dissenting:

The decision of the majority in this case, finding, for different reasons, a violation of Section 8 (b) (4) (A) is, in my opinion, of extraordinary importance. Its importance lies in the fact that two members of this majority have now taken the position that the *mere existence* of a "hot cargo" contract between a common carrier and a union may be evidence

[56] On a factual basis, however, I also find it unnecessary to reach or to decide that portion of this case which deals with the acts and statements of stewards, in view of the determination herein that the acts of admitted union agents are such as to support the complaint. I neither adopt nor pass upon the determination made in the principal opinion upon this phase of the case.

of a violation of this Section of the Act. Never before has any member of this Board or of any court adopted so extreme a view. Only one member of the majority now adheres to the majority position in *Sand Door and Plywood Company*, 113 NLRB 1210; aff. 241 F. 2d 147 (C. A. 9) and *American Iron and Machine Works*, 115 NLRB 800, reversed in part, 247 F. 2d 71 (C. A. D. C.), *sub nom General Drivers Union* v. *N. L. R. B.* These decisions, the most recent Board pronouncements in this area of the law, are now before the Supreme Court of the United States on certiorari.

The main majority opinion correctly notes that the "hot cargo" contracts in this case are not alleged by the General Counsel to be illegal. Accordingly, the Trial Examiner has not passed upon this issue and the parties have not litigated it. But despite this fact, that opinion purports to hold that unions and their members "cannot, as a matter of law, enjoy, exercise, or assert any of the 'hot cargo' privileges such contracts purport to grant and that any attempt so to do for the purposes sought to be served by such contracts exposes the unions to liability under Section 8 (b) (4)." This *dicta* is of such extraordinary importance and so novel that it should be decided only after the most thorough consideration with full notice that such an issue is being litigated and full opportunity for all parties to be heard, to examine and cross-examine witnesses, to introduce relevant evidence, and to make argument on it to a Trial Examiner and to the Board. This is the very minimum of due process.

I have in other decisions fully set forth my views as to the legality of union conduct pursuant to an employer's contractual agreement not to require its employees to handle the goods of another employer.

See the dissenting opinions in *Reilly Cartage Co. et al*, 110 NLRB 1753; *McAllister Transfer Co., et al.*, 110 NLRB 1790; *Sand Door and Plywood Company*, 113 NLRB 1222; *American Iron and Machine Works*, 115 NLRB 803. These dissenting opinions are in conformance with decisions of the Court of Appeals for the Second Circuit, *Rabouin d/b/a Conway's Express* v. *N. L. R. B.*, 195 F. 2d 906, most recently reaffirmed in *Milk Drivers Union* v. *N. L. R. B.* (*Crowley's Milk Co.*,) 245 F. 2d 817 (June 19, 1957). The dissenting opinion in *American Iron and Machine Works, supra*, as it pertains to the contracting union, has most recently been adopted by the Court of Appeals for the District of Columbia in *General Drivers Union* v. *N. L. R. B.*, 247 F. 2d 71 (May, 1957), reversing to that extent the majority's contrary decision.

The court's decision in the latter case has particular relevance to the decision of the majority here. The court reasoned as follows:

> If an employer may lawfully agree that its employees will not be required to handle freight from a struck company, and such a situation arises, it is hard to see how it can be said that, simply because the employees do what they have a right to do, there was a strike or refusal to work.

This, in my opinion, is the short answer to the argument that such an agreement is invalid because it is "in derogation of the public policy expressed in the Act." So far as I can determine there is not a word in Section 8 (b) (4) (A) or its legislative history to suggest, even remotely, that Congress intended to restrict the right of an employer to do business or to cease doing business with another employer. Nor is there any language in the Statute

which can be interpreted as forbidding a union to seek and obtain a contract whereby an employer agrees that he will not do business with another employer engaged in a labor dispute. Whether or not there should be such a prohibition in the Act is a matter for the Congress to decide. But to say that Congress has already established a public policy invalidating the execution of "hot cargo" contracts does not comport either with the language or purpose of Section 8 (b) (4) (A). That Section of the Act, as the Board and the courts have frequently held, forbids *strikes* or *inducements to strike* with an object to force a neutral or secondary employer to cease doing business with another employer. Neither the means, a strike or an inducement to strike, nor the object, a cessation of business, is, standing alone, unlawful. The *means* becomes unlawful when it is established that such an object exists. The "general secondary boycott provisions" of this Statute do not afford a basis for holding that the mere cessation of business between two employers, whether by contract or otherwise, has been proscribed by Congress. Obviously, therefore, no "specific exception" to such provisions was deemed necessary by Congress in order "to legalize" such contracts. Congress simply has not legislated with regard to this matter. The public interest with which Congress was concerned was directed against secondary *strikes* and the consequent involvement of *neutral* employers in controversies not theirs. It was not intended to protect *primary* employers from primary strikes or from contracts which enlisted the support of other employers.

When the *American Iron and Machine Works* case was before this Board the majority held that a union's "appeals to employees" not to handle "hot cargo" notwithstanding their contractual right to be

free from such work was a violation of Section 8 (b) (4) (A). The dissenting opinion pointed out that such broad language, carried to an absurd extreme, might be interpreted as forbidding a union to "discuss a hot cargo clause at a membership meeting." That extreme is now the factual basis of the majority's decision in the instant case.

To the extent the majority finds that the Respondent Union *sponsored* a strike or *induced* employees to engage in a strike its decision, in my opinion, is *factually* incorrect. To the extent two members of the majority assume power to determine public policy under a different federal Statute regulating interstate transportation at a time when decisions of this nature[57] are pending before the tribunal selected by Congress to determine such issues in the first instance, their decision, I believe, intrudes on the exclusive jurisdiction of the Interstate Commerce Commission.

As I read the several opinions of the majority in this case, there is no majority decision that these "hot cargo" contracts are in and of themselves violative of Section 8 (b) (4) (A), as only two members of the Board so hold. The Union's conduct *in this case* must therefore be considered in the context of a lawful agreement, granting certain rights to its members with respect to the handling of "unfair goods." It is to be noted that the U. S. District Court for the Northern District of Georgia, Atlantic Division, denied the application of the General Counsel for a preliminary injunction under Section 10 (1) of the Act

[57] *Galveston Truck Line Corporation* v. *Ada Motor Lines, Inc., et al.*, Case No. MC-C-1922, Report and Recommended Order issued by ICC Hearing Examiner on April 8, 1957; *Nebraska Short Line Carriers, Inc., Common Carrier Application*, No. MC-116067 (Sub-No. 2) Report and Recommended Order issued by ICC Hearing Examiner on August 8, 1957.

on the ground that there was no reasonable cause to believe that the Respondent Union had violated Section 8 (b) (4) (A). The facts upon which the Court relied in that case are substantially the same as those presented here. In its opinion the court adverted to the affidavits of officers of the Union and "more than 230 employees of the carriers involved to the effect that their action in refusing to handle goods of Genuine and Rayloc was their voluntary and individual decision and that the officers of the respondent Union did not in any way order, instruct, direct or appeal to such employees not to handle such goods, and that no officers or agent of the respondent Union has in any way induced or encouraged the employees not to handle the freight of Rayloc or Genuine Parts." The Court could not agree with the General Counsel that a union's *advice* to its members as to the rights guaranteed to them by a lawful contract constituted unlawful inducement to engage in a secondary boycott. Indeed, the record in this case shows that the union official who presided over the special meeting made it absolutely clear to the membership that his *sole* purpose was to determine their *individual* intentions with regard to the handling of Rayloc goods; that their contracts with the carriers gave them the right to make a personal decision; that the Union would not in any manner attempt to tell them what to do. Moreover, following passage of a resolution expressing the members' individual intentions, the presiding official again advised the membership that this resolution did not bind any one of them to refuse to handle unfair goods; that they were, as previously, free to handle or not to handle such goods no matter how they had voted. It is particularly revealing that the presiding official had previously rejected a motion from one of the members to the effect that union members would

refuse to handle Rayloc goods. He told the members that such a motion might be interpreted as union action whereas the Union wanted to maintain a neutral position and to leave the queston of handling Rayloc goods to each member as an indivdual. The recital of facts in the majority opinion ignores this step.

It is the conclusion of the majority that the exercise by individual employees of their rights under these contracts was an "integral part" of a union program to achieve this result. The "proof" upon which the majority relies consists of: (1) the fact that individual employees did refuse to handle "hot cargo"; (2) the fact that a meeting was called to determine their intentions, as individuals, on this issue; (3) the fact that a resolution was adopted by the members at this meeting which, after reciting the pertinent provisions of the "hot cargo" contracts, stated that "each of the members has made and now announce(s) his individual voluntary decision not to hand(le) such goods;" and (4) the fact that the Union offered to protect any employee from retaliatory action by his employer in the event the employee decided, pursuant to his individual right under the contract, not to handle Rayloc goods.

It is as clear to me as it was to the District Court that these facts do not add up to a union-sponsored strike or union inducement of employees to engage in a strike. I know of no way in which this Union could have dissociated itself more clearly from the individual views of its members or the exercise of their individual rights. It is true, of course, that the Union could have ignored the fact that its members were entitled under their contracts to make a personal decision on the handlng of the unfair goods. It could have refused to provide them with the forum for the expression of their individual intentions. It could

have reneged on its obligation under the contracts to inform the employers of the intentions of its members. Having gone this far, it could also have denied employees the protection of their union in the event their employers, in violation of the contracts, retaliated against those who elected not to handle unfair goods. Apparently, this is the only course that the majority believes would have been proper for the Union in this case.

To support its finding that the Union's conduct in this case constituted unlawful inducement under Section 8 (b) (4) (A) the majority relies upon the decision of the Supreme Court in *International Brotherhood of Electrical Workers* v. *N. L. R. B.*[58] The decision of the court in that case, however, is not even remotely related to the facts that appear in this record. There the court faced the issue of whether Section 8 (c) immunized peaceful picketing "even though the picketing induces a secondary boycott made unlawful by Section 8 (b) (4)."[59] In quoting "pertinent language" from this decision the majority omits the topic sentence of the quoted paragraph, which reads as follows:[60]

> "a. To exempt peaceful picketing from the condemnation of Section 8 (b) (4) (A) as a means of bringing about a secondary boycott is contrary to the language and purpose of that section. The words 'induce or encourage' are broad enough to include in them every form of influence and persuasion . . ."

It would seem clear, therefore, that the words "influence and persuasion", as used by the Supreme Court, were intended to embrace conduct, such as

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[58] 341 U. S. 694.

[59] *Ibid*, at page 701.

[60] *Ibid*, at pages 701–2.

peaceful picketing, whereby the union sought *affirmatively* to induce, encourage or persuade employees to engage in a strike for a forbidden objective. However broad those terms may be, they are not broad enough to include advice by a union to its members that, as individuals, they have a contractual right to refuse to perform certain work, particularly where, as here, they are also advised that each member must make a decision for himself and, having made it, is free at any time to reverse himself. To hold, as the majority does, that persuasion and influence resulted from "an incident of a 'good faith' attempt by Union officials to perform an intra-union duty to 'advise' the members" seems to me to do violence both to the Supreme Court's decision and the statutory language upon which it is based.

In addition to its finding of "union sponsored" action the majority finds that certain remarks and the silence of individual job stewards in connection with the handling of Rayloc freight constitutes "direct evidence" that the Union violated Section 8 (b) (4) (A). The majority predicates this finding on the ground that the stewards were agents of the Union and "were expressly vested with sufficient authority so to act, as to warrant the inference that the actions here attributed to them fell within the scope o' the delegated powers." The record in this case shows contrariwise, however, as the district court found, that these stewards were *expressly limited* in their authority to act on behalf of the Union with regard to strikes or other interruptions to the Employer's business. Article V of the collective bargaining agreement provides as follows:

> The Employer recognizes the right of the Union to designate a job steward and alternate to handle such Union business as may from

time to time be delegated to them by the Union. *Job stewards and alternates have no authority to take strike action or any other action interrupting the Employer's business in violation of this Agreement, except as authorized by official action of the Union.* (Emphasis supplied.)

The Employer recognizes this limitation upon the authority of job stewards, and their alternates. The Employer, in so recognizing such limitations, shall have the authority to render proper discipline, including discharge without recourse to such job steward or his alternate, if he be an employee, in the event the job steward or his alternate has taken unauthorized strike action, slow down, or work stoppage in violation of this Agreement . . ."

It is well established that the term "agent" as used in this Statute means an agent under the common law rules of agency.[61] Application of such rules makes it clear that the above contractual provision, signed by the Employer and open to the employees' inspection, specifically removed from the stewards' authority any right on their part to speak for the Union in calling for unauthorized work stoppage or otherwise interrupting the Employers' business. Section 167 of the *Restatement of the Law of Agency* states the rule as follows:

> If a third person dealing with an agent has notice that the agent's authority is created or described in a writing which is intended for his inspection, he is affected by limitations upon the authority contained in the writing, unless misled by the conduct of the principal.

Based on the foregoing I can only conclude that the ambiguous comments of the stewards and their silence on several occasions in connection with the intention

[61] *Sunset Line and Twine Company*, 79 NLRB 1487.

of employees to work on Rayloc goods was, if considered an inducement to strike, beyond the scope of their authority as agents of the Union.

I turn now to the last and, in my opinion, most important issue in this case. Two members of the majority have undertaken to find a violation of Section 8 (b) (4) (A) by reference to, and incorporation of, the Interstate Commerce Act, which requires that common carriers generally must provide service without discrimination. While purporting to limit their decision to such employers, they rely, nevertheless, upon the entire legislative history of Section 8 (b) (4) (A) to find that "the 'hot cargo' contracts here involved are repugnant to the basic policies of the Act and in conflict with the public rights this Board is under a duty to protect." I have already discussed public policy as it relates to this Section of the Statute. I am not aware of, nor have I been able to discover, any additional legislative history creating a distinction between secondary boycotts affecting common carriers and those involving other employers. I shall therefore restrict my discussion of this phase of the case to the issue, raised in the main opinion only, that "where the contracting employers are common carriers the existence of the Interstate Commerce Act destroys" the argument that under Section 8 (b) (4) (A) employers are free, at will, to cease doing business with any individual and to agree to this result. To what extent common carriers are or are not free under the Interstate Commerce Act to restrict their service to shippers is a matter to be decided by the agency established by Congress to make such initial decisions. To my knowledge the Board has never purported to decide a question arising under another Statute at a time when a decision involving that question is pending before the agency charged with the

administration of that Statute. Two questions now pending before the Interstate Commerce Commission are (1) whether a common carrier is excused from his duty to transport freight because he has agreed by contract with a union not to handle unfair goods,[62] and (2) whether the public convenience requires the granting of an application for interstate operation of a carrier where the applicant charges that shipments have been refused by established carriers because the latter are bound by "hot cargo" contracts with unions representing their employees.[63] The decision of the Commission may or may not be favorable to the theory that a common carrier's refusal to accept shipments because of the existence of a "hot cargo" contract is a reasonable regulation or practice in connection with his duty to provide "safe and adequate service." Obviously, neither I nor my colleagues can now foreteh what that decision will be. The applicable provisions of the Interstate Commerce Act are contained in 49 U. S. C. 316 (b) and 316 (c) as follows:

> It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and *just and reasonable regulations and practices relating thereto* . . .
>
> Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers . . . In case of such joint rates, fares, or charges it shall be the duty of

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[62] *Galveston Truck Lines Corporation* v. *Ada Motor Lines, Inc.*, *supra*, ftn. 57.

[63] *Nebraska Short Line Carriers Inc., Common Carriers Application*, *supra*., ftn. 57.

the carriers parties thereto to establish *just and reasonable regulations and practices in connection therewith* . . . (italics added).

The Commission is the *sole* tribunal authorized by Congress to hold, subject to review by the courts, that the regulations and practices of a particular common carrier, including its reliance upon "hot cargo" contracts or refusing to accept shipments, are either reasonable or unreasonable. Granted that the Board has a duty "not to ignore the other and equally important statutory schemes in administering our statute," that duty does not extend to a pronouncement of the law under such a statute *before* the tribunal charged with its enforcement has spoken. Section 8 (b) (4) (A) forbids a labor organization or its agents "to engage in, or to induce or encourage the *employees* of any employer to engage in, a strike . . ." (italics added) for a proscribed objective. It does not forbid, and the Board has consistently so held, the inducement of *employers*. Now two members of the majority say that the Board has a duty to accommodate this statute to that of the Interstate Commerce Act by holding that a carrier-employer may not, at the request of a union, voluntarily agree to boycott the goods of another employer. They hold that the mere exercise of such a contractual right "exposes the un-

"Questions as to the reasonableness of rules, regulations, and tariffs are for the Interstate Commerce Commission, and until found unreasonable by it a shipper may not maintain an action in any court against a carrier upon the claim that any rule or regulation is unreasonable and that through its enforcement he has sustained loss or damage." *Baltimore & Ohio R. Co. v. Brady*, 288 U. S. 448, 458, 53 S. Ct. 441, 77 L. Ed. 888; *Pennsylvania R. Co. v. Puritan Coal Mining Co.*, 237 U. S. 121, 131, 35 S. Ct. 484, 59 L. Ed. 867.

[illegible] *Express, Inc.*, 92 NLRB 255; *Sealright Pacific Ltd.*, 82 NLRB 271.

tion to liability under Section 8 (b). (4)-(A)." This, it seems to me, is something more than accommodation of our Act to the Interstate Commerce Act. It is legislation. Such a result was carefully avoided by the Court of Appeals for the Eighth Circuit in *Meier & Pohlmann Furniture Company* v. *Gibbons* 38 LRRM 2533, 2540-41 (April, 1956). Faced with this issue in a suit by a shipper for damages, the court would not presume to hold that "hot cargo" contracts were contrary to the public policy of the Interstate Commerce Act. Rather, the court looked to the Labor Management Relations Act to determine, first, whether such contracts were legal and, second, whether they constituted a defense to conduct otherwise violative of the Act. The court pointed out that this Statute proscribed secondary boycotts by labor organizations, but that "the prohibition does not extend to individual members of such organizations or to the employer." The court pretermitted consideration of the *Contract's Express* rule in view of contrary Board decisions. Unlike this Board, that court has jurisdiction with regard to questions under both the Interstate Commerce Act and the Labor Management Relations Act. It seems to me that two members of the majority in this case are doing without statutory authority what that court with such authority has refused to do.

Neither of the Hearing Examiners in the cited cases before the Interstate Commerce Commission purported to pass upon the legality of the "hot cargo" contracts. In one case[28] the Examiner held that such an issue was "beyond the Commission's proper sphere of activities." He found that the Commission was concerned with the lawfulness of the actions of the

[28] *Galveston Truck Line Corporation* v. *Ada Motor Lines, Inc.*, *supra*, fn. 57.

carriers "without regard to any contract which the carriers may have executed with a third party." In the other case[87] the Examiner found that "it would be unwise to attempt to use the certificate provisions of the Act to compel carriers to cross picket lines or to defy or ignore the actual or implied threats of their recognized union." He held that whatever defects in service resulted from the carriers' "hot cargo" contracts such defects were insufficient to warrant the conclusion that their services and interchange practices were inadequate for public convenience and necessity. It would seem quite reasonable to me that a labor relations contract *unlawful under the Labor Management Relations Act,* urged by the carrier in a case before the Interstate Commerce Commission as an excuse for his failure to transport freight, might be considered by that body an untenable defense. But it does not follow that a contract, lawful under the express provisions of this Statute, becomes unlawful because it may be held to be inadequate as a defense to a charge that a particular carrier has imposed an "unreasonable" regulation in the transport of freight. Indeed, the Commission itself has specifically refused to express any opinion with regard to the legality of a contract between a carrier and a union which provided for a closed shop and contained a clause exonerating employees from the duty to cross a *bona fide* A. F. of L. picket line. The complainant had argued that the contract was incompatible with the carrier's duty to serve the shipper's plant. The Commission rejected this argument, holding that the question "*is a matter involving the labor relations between the carriers and their employees over which we have no*

[87] *Nebraska Shore Line Carriers: Common Carrier Application, supra,* ftn. 57.

jurisdiction." (Emphasis added.) *Montgomery Ward & Co., Inc.,* v. *Consolidated Freightways,* 42 M. C. C., I. C. C. 225, 235. The Commission went on to find that the carrier in that case had acted reasonably in refusing to serve the shipper as a result of a strike at the shipper's plant for which the carrier was not responsible. The issue of the contract's validity under the public policy of the I. C. C., raised by the main opinion in the instant case, is an issue that the Commission itself has refused and presumably will continue to refuse to consider. This is so because the function of the Commission is to decide whether a carrier has acted "reasonably", *regardless of the legality or illegality of his contractual commitments.* I take it the Commission has the power to decide that a carrier has acted unreasonably because he has refused to transport freight as a result of a lawful strike of his own employees. Is it then the duty of the Board, under the main opinion's theory, to hold that such a strike is contrary to the public policy of the Interstate Commerce Act and therefore unlawful under the Labor Management Relations Act? If this is so, how will my colleagues answer the mandate from Congress under Section 13 of the Act: Nothing in this Act, *except as specifically provided for herein,* shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." Will they say that the strike is unlawful because the Board has a duty to accommodate this Statute to that of the Interstate Commerce Act?

If I understand the "summarized" purpose of the main opinion it is a holding that the Board may in this case impose a qualification upon an employer's right to choose his customers because "the ICA in itself restricts and qualifies the common carriers'

freedom of choice in the respects noted." As indicated above, no decision of the ICC has ever, in fact, so restricted a common carrier. A blanket rule by the ICC forbidding common carriers to execute or rely upon "hot cargo" contracts under any circumstances would seem on the basis of their existing precedents an unlikely possibility. In any event, the boycotting of shippers by common carriers subject to the ICA, whether or not at the request of any persons, is a subject matter over which this Board has absolutely no jurisdiction. As Member Bean points out in his concurring opinion, this is not a situation where the Board and another federal agency are both required to interpret and apply the same statutory provisions. Even in such a situation the Board normally defers, as a matter of comity, to the views of the agency primarily entrusted with the administration of the Statute in which such a provision occurs. The ICC is charged by Congress with the duty of regulating the operations of common carriers among the several States. This Board is charged with the duty of enforcing a proscription of secondary boycotts. Comity between governmental agencies does not require that the ICC find a common carrier in violation of the ICA because the Union representing its employees has engaged in a secondary boycott affecting the operations of the common carrier. Comity does not require that the Board find a union's conduct, otherwise lawful, unlawful under Section 8 (b) (4) (A) because a common carrier has, at the union's request, violated the provisions of the ICA.

This Board does not have unlimited authority to find unfair labor practices not proscribed by Congress or to excuse such practices if proscribed by Congress. So far as is here pertinent, to find a violation of

Section 8 (b) (4) (A) it must be proved by the General Counsel by a preponderance of evidence that a labor organization or its agents: (1) has engaged in a strike; or (2) induced employees to engage in a strike or concerted refusal in the course of their employment to transport goods with an object; (3) to force or require their employer; (4) to cease doing business with any other person.

The quantum of proof required by the Statute and all decisions of this Board and the courts, for an 8 (b) (4) (A) violation, would be reduced by the decision of two members of the majority as follows: It is *prima facie* proof of a violation of Section 8 (b) (4) (A) if (1) a union has a contract with a common carrier whereby the latter has agreed not to handle unfair goods; and (2) if a shipper of "hot cargo" has been denied an opportunity to utilize the transportation facilities of the carriers. I point out that what is stated to be "proof" of a violation of Section 8 (b) (4) (A) does not require a scintilla of evidence that a strike has occurred, or that any employee has been induced to strike, and requires only a minimum of evidence that any employer has been forced or required to cease doing business with another person.

Public policy, whatever it may be under the Interstate Commerce Act or, indeed, under this or any other Statute is not a substitute for evidence of a *fact*. The *fact* required by Congress under Section 8 (b) (4) (A) is that a *union has engaged in or induced employees to engage in a strike*. The Board is without power to hold that public policy against "hot cargo" contracts creates a violation of Section 8 (b) (4) (A) where none would otherwise exist. Whether "hot cargo" contracts are desirable or undesirable, whether or not they should be *per se* unlawful

is a matter for Congress, and Congress alone, to decide. To hold that the mere *existence* of these contracts may be a violation of Section 8 (b) (4) (A) seems to me outright legislation. Assuming, arguendo, that the Interstate Commerce Commission would ultimately decide that these carrier-employers violated their duty under the Interstate Commerce Act when they executed "hot cargo" contracts, the question must still be answered in this case whether the employers had, in *fact*, lawfully or unlawfully, authorized their employees to refuse to handle "hot cargo". If such authorization was given and continued, it is immaterial so far as the Union is concerned that the employers acted improperly. The union's only obligation under Section 8 (b) (4) (A) is to refrain from striking or inducing employees to strike. This Section of the Act, wisely or unwisely, does not proscribe other means used by the union to achieve its objectives. I must point out that the decision of two members of the majority in this case goes much further than the majority's decision in the *Sand Door* case, *supra*, where the majority found *actual inducement of employees by an overt act of the Union*. Here, without such evidence, the main opinion holds that a contract, granting employees the right not to handle hot cargo, *proves* that the union, party to such a contract, has induced employees to refuse to work against the wishes of their employer. This is as much as to say that when an employer says "no" he means "yes." Under such a theory a union induces *employees to strike* when it induces an *employer not to require them to work*. It goes without saying that the Board has never been authorized by Congress to hold that a union violates Section 8 (b) (4) (A) merely because a shipper has been denied an opportunity to use the transportation facilities of a

carrier pursuant to an agreement between the latter and the union. It would also seem axiomatic to me that an employer's agreement with a union to deny services to another employer cannot be considered a substitute for evidence of a strike or inducement of employees to strike. In my opinion, this Board should look to its own house and let the Interstate Commerce Commission, with the help of Congress and the courts, fortify and effectuate the purposes of that Act.

Dated, Washington, D. C.

ABE MURDOCK, *Member.*
NATIONAL LABOR RELATIONS BOARD

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